REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

AND

OTHER COURTS,

FROM TRINITY TERM, 49 GEO. III. 1809,
TO EASTER TERM, 50 GEO. III. 1810,
BOTH INCLUSIVE.

With Tables of the Cases and Principal Matters.

By WILLIAM PYLE TAUNTON,
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

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JUDGES

OF THE

COURT OF COMMON PLEAS,

During the Period contained in this VOLUME.

Right Hon. Sir JAMES MANSFIELD, Knt. Ld. Ch. J.
Hon. JOHN HEATH, Esq.
Hon. Sir. SOULLAN LAWRENCE, Knt.
Hon. Sir ALAN CHAMBRE, Knt.

A

TABLE

OF THE

NAMES OF THE CASES,

REPORTED IN THIS VOLUME.

N. B. The Cases, the Names of which are printed in *Italics*, are printed or cited from MS. Notes.

Cruick-

Langton,

ADDITIONAL TABLE OF ERRATA in the first Volume.

Page 430, line 22, for *his* read *Reynolds's*.
432, l. 14, for *much to be rebutted*, read *much by which the presumption may be rebutted*.
555, l. 19, for *Quell had let to Donovan*, read *Quell had let to Donovan upon the same terms*.
571, last line but two, for 6 *East*, 347., read 6 *East*, 348.
578, l. 23, after *appointed* read a parenthesis,).
581, l. 31, for *devised*, read *demised*.
636, index, col. 2, l. 15, after *Itineris*, read *Christy* v. *Row*.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Trinity Term.

In the Forty-ninth Year of the Reign of GEORGE III.

GLADWYN *v.* BROWN.

June 2.

Where the length of time elapsed made it impossible to swear that certain outlying parcels, situate in a different parish from the rest of the estate, were intended to pass by a fine, the Court permitted the name of the parish to be inserted in the fine, upon seeing that they were comprehended in the deed to lead the uses.

UPON the motion of *Clayton*, Serjt., the Court permitted a fine to be amended by inserting the parish of *Westleigh*, upon an affidavit that several closes, of one, three, and four acres, parcel of the estate, lay in that parish, and that it appeared by the deed to lead the uses, which bore date in 1779, that the whole was intended to pass; although on account of the length of time which had elapsed since the date of the deed, no one could swear, nor did the affidavits state, that these parcels were intended to pass.

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June 5.

In an action on a bill given for the price of goods sold under a warranty, the breach of the warranty is an answer to the Plaintiff's demand, if the Defendant has tendered back the goods, although the Plaintiff did not accept them.

LEWIS v. COSGRAVE.

THIS was an action brought upon a banker's check for 15*l*., payable to bearer, drawn by the Defendant, of which the Plaintiff was the holder. The defence was, that the check was given for the price of a horse bought by the Defendant of one *Dennis* for 13 guineas, under a warranty of soundness, and the difference of 1*l*. 7*s*. had been given to *Dennis* in money: the horse was in fact the Plaintiff's horse, and *Dennis* was employed to sell him merely as agent for the Plaintiff; the horse was discovered to be clearly unsound, and the Defendant having found out who was the real seller, tendered the horse with the sum of 1*l*. 7*s*. to the Plaintiff, who again sent it back to the Defendant; upon which the Defendant again sent it and put it into the Plaintiff's stable, in his absence, without his knowledge. *Heath* J., who tried the cause at the last *Essex* spring assizes, was of opinion that as the Plaintiff had refused to receive back the horse, the contract for the sale was not rescinded, and that the Defendant was therefore bound to pay the bill, and had his remedy by an action for the deceit; and the jury under this direction found a verdict for the Plaintiff.

Best Serjt. in the last term obtained a rule *nisi* to set aside this verdict, and have a new trial, upon the ground that, although in an action for money had and received, it would have been necessary to shew that the contract was completely rescinded, yet that this being an action upon a bill of exchange, upon the failure of the consideration, which was a sound horse, the bill was gone.

Shepherd Serjt., in shewing cause, contended that the circumstance of the horse not proving sound, was no answer

swer to the Plaintiff's case. If a horse or any other goods are sold on a warranty, according to the case of *Weston* v. *Downes*, *Doug*. 23. and other cases, the buyer cannot recover back the money paid, unless the seller consents to receive back the thing sold. If the law were otherwise, the consequence would be, that the buyer would acquire a right to keep the horse without paying any thing for it. The contract consists of several ingredients, the sale, the delivery, and the warranty: if the horse be not delivered, the seller cannot recover the price; but if he has delivered it, he has a right to claim payment for the horse, and if the other be defrauded, he must bring his action. If the unsoundness of the horse be a sufficient ground to resist the payment, it would also be a sufficient ground to recover back the price after it was paid, and then the purchaser would have both the horse and the price. The buyer, therefore, cannot defend himself here, unless he can rescind the contract without the assent of the seller; and in *Weston* v. *Downes* it was expressly decided that he cannot do that. The seller must therefore recover: and he must recover the whole price, not the actual value of the horse; for where the price of goods has been stipulated, the seller cannot recover a different price on a *quantum valebant*. To decide otherwise would introduce this anomaly, that where money has not been paid, the buyer is not bound to pay the price; but that where he has paid it, he cannot recoup it back again.

Best, contrà, admitted the authority of *Weston* v. *Downes*, but contended that it was not applicable. There the money had been paid. Suppose that in the present case no note had been given: where a Plaintiff brings his action for goods sold, upon proof that the goods are not answerable in quality to the description by which they are sold, and that an offer has been made to return them, it is the daily practice of the courts to nonsuit the Plain-

 tiff;

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tiff; and it is equally usual to do so in actions brought upon the bills and other securities given for goods delivered under the like circumstances. The Plaintiff must not be permitted to say, that although the horse is worth nothing, yet as he has a security for the price, he can insist on the payment of it. In the case of *Jeffries* v. *Austen*, 2 *Str.* 674, it was held a good defence to an action on a promissory note, that it was given as a reward in case the payee should procure the Defendant to be restored to an office, which he did not effect. It might have been urged in favour of the Plaintiff, with equal reason in that case as in this, that he was entitled to recover on his note, and that the Defendant might bring his cross action for the non-performance of the Plaintiff's engagement. But it is in all cases a sufficient defence to shew that a bill was given without consideration: nor was it necessary for the Defendant to shew that the Plaintiff took back the horse; it is enough that he offered to return it: the Defendant has it not, and has received no benefit from it; the Plaintiff, therefore, cannot recover: and if he could, the only effect of his success would be to entitle the Defendant to recover back the same sum, together with all the costs of this action.

Cur. adv. vult.

HEATH J. afterwards observed that, on reviewing the evidence, there was clear proof that the Plaintiff knew of the unsoundness of the horse, to which he had not at first adverted; whereupon

The Court held, that as it was clearly a fraud, and as a man cannot recover the price of goods sold under a fraud, the rule for a new trial must be made absolute.

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FRASER *v.* HOPKINS and Another.

June 6.

The entry in the custom-house books of the transfer of a vessel to a particular person, is not even *primâ facie* evidence for a stranger, to charge that person as owner, unless the entry be shewn to be made by the authority of the person named in it.

THIS was an action brought against the Defendants as the registered owners of the *Prince of Wales*, a *Harwich* packet, to recover the value of some provisions furnished by the Plaintiff for the use of that vessel. Upon the trial, at the *Guildhall* sittings after last *Easter* term, before *Mansfield* C. J., in order to prove that the Defendants were liable, as the owners of the vessel; the Plaintiffs called the registrar of the port of *London*, who produced an entry in his register book of a certificate transmitted from the proper officer at the outport of *Harwich*, by which it appeared that the whole property in the vessel was transferred to the Defendants on the 10th of *October* 1807: together with the letter signed by the comptroller and collector of the customs at *Harwich*, that accompanied the transmission of the certificate. This evidence being rejected as inadmissible, the Plaintiff produced the book kept by the officer at *Harwich*, in which the original entry of the transfer was inserted: the Chief Justice rejected this evidence also; and the Plaintiff having no other proof that the Defendants were liable, was nonsuited.

Best and *Vaughan* Serjts. now moved to set aside the nonsuit, and have a new trial. They contended that the book kept in the port of *London* was evidence, and indeed the only proper evidence to prove the ownership. The stat. 26 *Geo. 3. c.* 60. *s.* 16. directs, that upon every alteration in the property of a vessel, made in the same port to which she belongs, the persons authorised to make registry, shall cause an entry of the indorsement made on the certificate of registry, to be also indorsed on the oath or affidavit on which the original certificate of registry

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registry was obtained, and also shall make a memorandum of the same in the book of registers, by that act directed to be kept, and forthwith give notice thereof to the commissioners of the customs. And wherever an act of parliament directs any transaction to be registred, the entry of that transaction made by the proper officer is evidence: and though this might not be conclusive evidence that the Defendants were owners, it was at least *primâ facie* evidence, and must be rebutted.

MANSFIELD C. J. To suppose the effect of the act to be such as is contended, would be to impute madness to the legislature: it supposes, that without proof of any bill of sale to the Defendants, or any act done by them, or any connection shewn between them and the officer, a letter written by a custom-house officer, and an entry made in *London* in consequence of that letter, will make the Defendants liable to all the world as owners of the vessel. The entry is evidence of the registration; it is not evidence of the transaction of sale. I never yet knew an instance where the act of any one man could charge another unconnected with him; nor was it ever yet supposed that a register was of itself evidence. In all cases of enrolments, the deed itself, and not the enrolment, is evidence. The clause of the act cited has not the least to do with the question. The register of *Harwich* does not prove the transfer. The register is not kept for the sake of the persons making, or the persons accepting the transfer, but for purposes of public policy.

HEATH J. In order to make this evidence, it is necessary to connect the Defendants with the entry; for any byestander may put down a name in the register. In the case of marriage, the register of marriage alone, without more, does not prove a man named in it to be the husband of a particular woman.

LAWRENCE J.

LAWRENCE J. Unless you shew all things to be done by the authority of the person who is to be charged, the register cannot be made evidence, even *primâ facie*.

Rule refused.

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FRASER v. HOPKINS and Another.

Sir JOHN THOMAS DUCKWORTH, Baronet, v. TUCKER.

June 6.

If the fleet of an ally and a *British* fleet serve together under a *British* commander in chief, who detaches the squadron of the ally, the Admiral of the auxiliary power is not entitled as a flag officer to share prizes made by *British* ships detached in another direction, to which he lent no actual co-operation in effecting the capture.

Because he is not in the pay of *Britain*, and the prize-acts and proclamations give the prizes only to those who are in the king's pay;

And because he is not, within the meaning of the proclamation, a flag officer assisting in the capture.

If an ally actually co-operates in effecting a capture, he cannot recover any proportion of the prizes in the common law courts of this country; he must sue in the prize courts.

If the prize court condemns a captured vessel as prize to his majesty, the sentence, while unappealed from, is conclusive on the common law courts, and on all the world, that no ally or other person is entitled to a share in it.

The common law courts cannot entertain jurisdiction of the question, whether prize or no prize, or by whom taken.

THIS was an action of *indebitatus assumpsit* for money had and received, &c. to which the Defendant having pleaded the general issue, the cause came on to be tried before *Mansfield* C. J. and a special jury, at the *Guildhall* sittings after last *Easter* term: and a verdict was found for the Plaintiff, subject to the opinion of the Court upon the following case:

By the treaties between *Great Britain* and *Portugal*, subsisting and in force at and during the several periods hereinafter mentioned, it was stipulated and agreed, that in the event of a *British* and *Portuguese* naval force acting together as auxiliaries, the officers of either contracting power commanding the smaller number of ships, should be subordinate to the one commanding the larger number, without consideration of their respective ranks. On the 14th of *May* 1798, the Marquis *de Niza*, a rear-

admiral

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admiral in the service of the Queen of *Portugal*, having under his command a squadron of four *Portuguese* ships of the line, and two frigates, joined, with his squadron, the *British* fleet then cruizing off *Cadiz*, consisting of a much greater number of ships, under the command of admiral Earl *St. Vincent*, and in obedience to the orders of the *Portuguese* government, put himself and his squadron under the command of the *British* admiral, who issued an order, requiring the Marquis, pursuant to the pleasure of her most faithful majesty, to put himself under Earl *St. Vincent*'s command, and to obey all such signals and instructions as the Marquis should from time to time receive from his lordship for the service of *their majesties* the King of *Great Britain* and Queen of *Portugal.* At that time, and thenceforth until, and long after the times of the several captures hereinafter mentioned, *Great Britain* and *Portugal* were both at war with *France;* and *Great Britain* was at war with *Spain* also; but *Portugal* and *Spain* were at peace with each other. By agreement between the *Portuguese* government and the government of *Great Britain*, to which both Earl *St. Vincent* and the Marquis *de Niza* were privy, the *Portuguese* ships were not to act against *Spain*, or to be employed in any manner likely to give offence to that power, with the exception, that if the *French* and *Spanish* squadrons in the *Mediterranean* should be found united, or having formed a junction should attempt to pass the Straits of *Gibraltar*, in such case those considerations of prudence and moderation which governed the conduct of the court of *Portugal* towards the *Spaniards*, should no longer restrain Earl *St. Vincent* from employing the *Portuguese* ships, in aid of the *British* fleet under his command, against the combined *French* and *Spanish* fleet. And the reason assigned by the *Portuguese* government for this exception was, that *Portugal* would in such case

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be exposed to danger, and that it would be reasonable to regard the *Spanish* ships as forming a part of the *French* fleet, against which the court of *Portugal* was embarrassed by no restrictions. Admiral Earl *St. Vincent*, at the time he was so joined by the *Portuguese* squadron, and until and on the 2d day of *July* 1798, and for a long time after, was commander in chief of all the *British* naval forces within the *Mediterranean*, and between that sea and *Cape Finisterre* in the *Atlantic* ocean. And Rear-admiral Sir *H. Nelson* on the 2d day of *July* 1798, and from that time until the Earl *St. Vincent* quitted that station, commanded a detached *British* fleet in the *Mediterranean*, under the orders of the Earl as commander in chief on that station. On the 2d day of *July*, Earl *St. Vincent* detached the Marquis *de Niza* with the *Portuguese* squadron and the *British* ship the *Lyon* of 64 guns, commanded by Captain *Dixon*, with orders to proceed into the *Mediterranean*, and join, and put himself under the command of Sir *H. Nelson*, to whom Earl *St. Vincent* had previously, on the 10th day of *June* 1798, addressed and dispatched an order, requiring him to take under his command the squadron under the orders of the Marquis, taking care not to employ him or them in any service likely to give umbrage to the court of *Spain*. In pursuance of these orders, the Marquis *de Niza* with the *Portuguese* squadron and the said *British* ship under his command, afterwards joined rear-admiral Sir *H. Nelson*, and put himself and was taken under his immediate command, and continued to serve under his command in the *Mediterranean* until the month of *March* 1800, prior to which period, (to wit) on the 20th day of *August* 1799, Earl *St. Vincent* quitted that station, that Sir *H. Nelson*, then Lord *Nelson*, succeeded to the chief command of the united *British* and *Portuguese* naval forces within the *Mediterranean*. During the whole term of the service of the Marquis *de Niza* and his ships, they were employed by

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by Lord *Nelson* in the blockade of *Malta*, at *Naples*, and *Sicily*, and upon such other services within the *Mediterranean*, sometimes with, and sometimes without *British* ships in company, as he deemed most expedient for the joint interest of *Great Britain* and *Portugal*, no alteration having been made in the said original orders, or in the said agreement between the two governments under which the junction with Earl *St. Vincent*, and with Lord *Nelson* respectively took place. During the time the Marquis *de Niza* and the *Portuguese* squadron so served, essential assistance was rendered by them to the operations of the *British* fleet; and but for their co-operation, part of the *British* squadron stationed off *Cadiz* must have been detached by the commander in chief upon the service undertaken by the *Portuguese* squadron. On the 19th of *June* 1799, Captain *Markham*, of the *British* ship *Centaur*, belonging to the *Mediterranean* fleet, and within that sea, being in company with some other *British* ships of war, captured five ships of war belonging to the *French* government; and on the 17th of *October* in the same year, Captain *Digby*, of the *British* frigate *Alcmene*, also belonging to the said fleet, in company with some other *British* ships, captured in the *Mediterranean* two ships of war belonging to the king of *Spain*; which *French* and *Spanish* ships have all been since finally condemned in the *British* Vice-admiralty Court at *Gibraltar*, *as good and lawful prize to our sovereign lord the king, seized by his majesty's ships the* Centaur *and the* Alcmene. The Marquis *de Niza*, though serving on the same station with the captains of the capturing ships, was not personally present at either of these captures: nor were the *Portuguese* ships, or any of them, assisting in either of the captures. By a decree of the 17th of *September* 1796, promulgated by the *Portuguese* government, and enforced down to, and at the times of the said several captures, his *Britannic* majesty's ships were prohibited from bring-

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ing *Spanish* prizes into the ports of *Portugal*, except in cases of urgent necessity; and even in such cases were forbidden to sell such prizes, or unlade their cargoes, or to remain a longer time in such ports than might be necessary to avoid apprehended danger, or to obtain such innocent succours as might be necessary for them. By his majesty's proclamations for the distribution of prizes taken from *France* and *Spain* respectively, pursuant to the statutes 33 *G.* 3. *c.* 66. and 37 *G.* 3. *c.* 109. issued prior to and in force at the times of the said captures, it is ordered and directed as follows: "Our will and pleasure is, that the net produce of all prizes taken as aforesaid, the right whereof is inherent in us and our crown, be given to the takers," (except as in the said proclamations is excepted). "And we do hereby further order and direct, that the net produce of all prizes which are or shall be taken as aforesaid by any of *our* ships or vessels of war, shall be for the entire benefit and encouragement of *our* flag officers, captains, commanders, and other commissioned officers *in our pay*, and of the seamen, marines, and soldiers on board *our* said ships and vessels at the time of the capture; and that such prizes may be lawfully sold and disposed of by them and their agents, *after the same shall have been to us finally adjudged a lawful prize, and not otherwise*. The distribution shall be made as follows:—The whole of the net produce being first divided in eight equal parts, the captain or captains of any *such* ships or vessels of war, who shall be actually on board at the taking of any prize, shall have three eighths of the net produce thereof; but in case any such prize shall be taken by any of *our* ships or vessels of war under the command of a flag or flags, the flag officer or officers being actually on board, or directing and assisting in the capture, shall have one of the said three-eighths, the said eighth part to be paid to such flag officer or officers, in such proportions, and subject to such

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such regulations as are hereinafter mentioned." And it is thereinafter among other things ordered and directed, "concerning the one-eighth part thereinbefore mentioned to be granted to the flag officer or flag officers, who shall be actually on board at the taking of any prize, or shall be directing or assisting therein: first, that a flag officer, commander in chief, when there is but one flag officer upon service, shall have to his own use the said one-eighth part of the prizes taken by ships and vessels under his command: secondly, that when more flag officers than one serve together, the eighth part of the prizes taken by any ships or vessels of the fleet, or squadron, shall be divided in the following proportions: viz. If there be but two flag officers, the chief shall have two third parts of the said eighth part, and the other shall have the remaining third part; but if the number of flag officers be more than two, the chief shall have only one-half, and the other half shall be equally divided among the other flag officers." It was agreed that the whole of the above, or any other prize proclamations of his majesty, might be referred to in the argument of this case. The *British* flag officers entitled under the said proclamations to participate in the benefit of the said *French* prizes, were, the Earl *St. Vincent*, as commander in chief, and ten subordinate flag officers, of whom the Plaintiff in this action was one; and the *British* flag officers entitled by the said proclamations to participate in the benefit of the said *Spanish* prizes, were Lord *Nelson*, as commander in chief, and the Plaintiff in this action. The Defendant, as prize agent for the captains, received the proceeds of the sales of the said *French* and *Spanish* prizes respectively, and the Plaintiff had received from him his full share thereof, supposing that the Marquis *de Niza* was entitled to participate therein as a flag officer; but if not, there remained to be paid by the Defendant to the Plaintiff in respect of his share of the net

net produce of the *French* prizes, the sum of 7*l.* 16*s.* 5¼*d.* and in respect of his share of the net produce of the *Spanish* prizes, the sum of 1646*l.* 14*s.* 8½*d.* The question for the opinion of the Court was, whether the Marquis *de Niza* was entitled to participate in the net produce of the said *French* and *Spanish* prizes respectively, or either of them, as a flag officer. If he was entitled to no such participation, then a verdict was to be entered for the Plaintiff, for the sum of 1654*l.* 11*s.* 2¼*d.* If the Marquis was entitled to such participation in the *French* prizes alone, then a verdict was to be entered for the Plaintiff for the sum of 1646*l.* 14*s.* 8½*d.*; if in the *Spanish* prizes alone, then the verdict to be entered for the sum of 7*l.* 16*s.* 5¾*d.*; but if the Marquis were entitled to such participation both in the *French* and *Spanish* prizes, then a verdict was to be entered for the Defendant. It was also agreed, that the present case might be turned into a special verdict, if the Court should so direct.

J. VAUGHAN.
A. ONSLOW.

The case, as it was at first settled, stated nothing of the sentence in the Admiralty Court at *Gibraltar*; but upon an intimation from the Court, that this was of the greatest importance to the merits of the case, that fact was afterwards added by consent before the second argument.

The case was twice solemnly argued: the first time in *Easter* term 1809, by *Vaughan* Serjt. for the plaintiff, and *Onslow* Serjt. for the Defendant; and the second time in the present term, by *Shepherd* Serjt. for the Plaintiff, and *Best* Serjt. for the Defendant.

Argu-

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Arguments for the Plaintiff.—The objection to the Plaintiff's recovery is, that the Marquis *de Niza*, as a foreign flag officer, commanding auxiliary ships, claims to participate in prizes taken by *British* ships from a common enemy, he not having been present at nor assisting in the capture. This claim must rest either on the law of nations, or on the municipal law of this country, and his majesty's proclamations: in case he should be entitled to any thing on either of those grounds, a distinction remains to be taken between the prizes taken from the *French*, and those taken from the *Spaniards*, the latter nation being not a common enemy, but the enemy of *Great Britain* only, and not at war with the auxiliary power. If the Marquis *de Niza* had any claim founded on the law of nations, the whole *Portuguese* squadron would be entitled to participate equally with him, in such proportions as the municipal or military law of their own country should assign to them; but this is not pretended: the Marquis here asserts his claim as a flag officer: the proportion assigned to a flag officer is the creature of our own municipal law, and is not founded on the law of nations; and the conflicting rights of flag officers depend upon the same ground: if therefore he claims as a flag officer, his claim must be determined upon an examination of the several prize acts and proclamations, which will be hereafter considered. If his claim is by the law of nations, it does not lie within the jurisdiction of this court, for no power will endure that the municipal courts of another nation shall legislate for them and for the whole world; if the claim depends on the law of nations, and accrues *jure belli*, it must be determined by the only courts of competent jurisdiction, the prize courts, to which by the tacit or express consent of nations, jurisdiction is given to determine their relative rights. This Court cannot entertain the questions, whether

whether the ships were prize, or to whom they were prize: upon these points the Admiralty Courts exercise an exclusive jurisdiction, and the courts of common law are concluded by their sentence. This proposition is established at large in the several cases of *Home* v. *Lord Camden*, 1 *H. Bl.* 476. The same case in error, 4 *T. R.* 382. *Brymer* v. *Atkins*, 1 *H. Bl.* 164. *Lindo* v. *Rodney*, *Doug.* 613. And *Le Caux* v. *Eden*, *Doug.* 594. The last was an action of trespass for seizing a ship, and the Court held, that inasmuch as it was seized as prize, and the question of prize or no prize was conusable solely in the Admiralty Court, whether the ship had been properly taken or not, it did not lie within their province to determine. The sentence of the prize court makes no mention of the assistance of the auxiliary force, which is conclusive that the *Portuguese* ships had no share in effecting the capture; for if they had assisted, the sentence would have condemned the prizes to the conjoined powers. If the *Portuguese* force had assisted in the capture, the captors should have libelled in the Admiralty Court, where they would have recovered such proportions as they were entitled to by the law of nations. In the case of *Home* v. *Lord Camden*, the Admiralty Court in the first instance condemned the ship taken as lawful prize generally, reserving the question who were the captors, and afterwards pronounced for the interest of the army; and the Court of Appeal reversed the sentence, and pronounced the ship and cargo to have been taken by the conjoint operation of the fleet and army, and condemned the ship and cargo as lawful prize to the king. If a prize is taken by a conjoint force, the prize courts of either of the allied powers have jurisdiction to condemn the vessel as prize to both, because each state would consider itself as the principal in the alliance. If a *Portuguese* and an *English* ship had jointly captured a vessel, the Admiralty Courts would have condemned her,

not

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not as prize to the king of *England*, but as prize to the king of *England*, taken by his majesty's ship, mentioned by name, and to the queen of *Portugal*, taken by her majesty's ship mentioned by name. Such an instance happened in a joint capture by the *Dutch* and *English* fleets, which is alluded to by Lord *Mansfield* C. J. in the *Omoa* case, *Le Cras* v. *Hughes*, *Park*. 358. In another case of the *Starling*, *W. C. Pinnegar* master, a vessel taken by the ship of an ally serving with a *British* squadron, the sentence of the Court of Admiralty, pronounced on the 29th of *June* 1798, declared, "that the "cargo belonged to enemies of the crown of *Great Bri*-"*tain*, and as such, or otherwise, the same was con-"demned as good and lawful prize, (not saying to "whom,) taken by a *Russian* ship of war called the *Rati*-"*zan*, being one of a squadron then acting under the "command of Rear-admiral *Macbride*," an officer commanding an *English* squadron. In this instance it is observable that the cargo was not condemned as prize to the king; evidently, because upon such a sentence the prize acts would attach, and vest the whole property of the prize in *British* subjects, to the exclusion of the *Russian* captors. In the principal case the proper authority has determined that the captured ships were taken by the vessels of his majesty, and they are condemned as lawful prize to his majesty alone. It was competent to the Marquis *de Niza* to question this position in that place, where alone it could be questioned with effect, a prize court; he might have made himself party to the original suit, or he might have appealed against the decree, under the provisions of stat. 33 *G*. 3. *c*. 66. *ss*. 28, 29, 30.; but as long as it stands, it is binding on the common law courts, and on all the world. But if the Court could examine this case on the ground of the law of nations, which it cannot, yet it would be found that the Marquis *de Niza* would have no title to a share in the

proceeds

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proceeds of this capture. It may be admitted that the forces of two allies effecting a naval capture in conjunction, are entitled to share the prizes; for that is common justice and the law of nations: in what proportion they would share, it is unnecessary to discuss; probably in the proportion of their respective forces employed in the capture. But this proposition must be confined to the case where an ally affords actual and effective co-operation in the conquest: and that co-operation did not subsist here. No other rule than this can be adopted; for if it be urged that the Marquis was virtually assisting to the capture, because he was acting on the same station, why is the reward for that service to be raised by reducing the share of the Plaintiff alone? Why are not the portions of every captain and every sailor to be reduced in equal proportion; and in that case the Plaintiff will still be entitled to recover to a certain amount in the present action. The limits of our stations are only the arbitrary institutions of our own government: the giving a share to flag officers who are supposed to assist by their counsels, is merely the consequence of our exposition of our own municipal law; it is a result arising from our construction of the words of his majesty's proclamation; and the criterion which our Admiralty Courts have adopted, to determine whether a ship lends assistance to a capture or not, is to enquire whether she was within sight, or within the hearing of the guns. [*Mansfield* C. J. suggested, that that was merely a rule of evidence, adopted to expedite the decision of causes between *British* subjects.] If the claim be not confined to allies actually co-operating, the right of participation must be extended to all allies, in whatever quarter of the globe their arms may be employed: for when it is said that the assistance of the Marquis *de Niza* in *Malta* and *Sicily*, enabled the *British* commander in chief to concentrate his own forces for other services, it might with equal truth be said that

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the fleet of an ally, serving in the *Baltic* or in the *East Indies*, would produce the same effect: it certainly would enable the Lords of the Admiralty to make a distribution of the *British* naval forces different from that which they could make but for such a co-operation; no doubt every ally in arms virtually co-operates with the allied state; yet it would be absurd to contend, that an allied fleet in the *East Indies* should share in prizes made in the *Mediterranean*. And no other line can be drawn, than either actual and effective co-operation, or this most extended and universal claim, which will equally entitle all allies so long as the alliance continues. If the claim of the Marquis *de Niza* is founded upon the prize acts and proclamations, it is necessary to see what they are. The right to prize at common law was vested in the king *jure coronæ;* the captors had no right whatever in it; the king might grant it to whomsoever he pleased; if he had granted the whole to the Plaintiff, except for the prize acts, no one could have contested the grant. Several acts have been passed at various times, respecting the prizes taken from different nations with whom we have been at war; they are all similar. The objects of them throughout are purely and solely *British*, and do not even glance at the interest of allies. The earliest are those of 6 *Ann.* c. 13. and 10 *Ann.* c. 17. *ss.* 9 and 13. the first, "for the encouragement of the sea service," enacts, "that officers and seamen of queen's ships, privateers, "&c. shall have the sole property in all prize ships;" the latter provides for the application of the proceeds of prizes "to and among the flag officers, captains, and "other officers and companies of her majesty's said "ships, their executors or administrators, entitled there-"to as aforesaid, if the same shall be decreed to them by "the High Court of Admiralty," and the surplus of the monies, after paying the rewards therein-mentioned, is appropriated "to the use of the royal hospital at *Green-"wich*."

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"*wich.*" The statute 33 *G.* 3. *c.* 66. which is the subsisting act regarding *French* prizes, and the 37 *G.* 3. *c.* 109. which is the subsisting act regarding *Spanish* prizes, are intituled, "acts for the encouragement of seamen, and for the better and more effectually manning "*his majesty's navy;*" and both enact, "for the encouragement of the officers and seamen of *his majesty's* "*ships of war*, and the owners, officers, and seamen of "all other *British* ships and vessels having commissions "and letters of marque, and for inducing all *British* seamen who may be in any foreign service, to return "into this kingdom, and become serviceable to his majesty, and for the more effectual securing and extending the trade of his majesty's subjects, that the flag "officers, commanders, and other officers, seamen, marines, and soldiers on board every ship and vessel of "war *in his majesty's pay*, shall have the sole interest and "property of and in all and *every ship, vessel, goods*, and "merchandizes, to be captured during the continuance "of hostilities, *after the same respectively shall have been* "*finally adjudged lawful prize to his majesty, in any of his* "*majesty's courts of admiralty in Great Britain, America*, "or elsewhere, which shall be duly authorized to take "cognizance of such captures, to be *divided* in such proportions, and after such manner, as his majesty by "proclamation shall think fit to order and direct:" and it is worthy of remark, that the case of a capture not made by the *British* navy alone, did not escape the notice of the legislature; for by the third section, in all conjunct expeditions of the navy and army "against any "fortress on land, directed by instructions from his majesty, the flag and general officers, and commanders "and other officers, seamen, marines, and soldiers, "acting in such conjunct expedition, shall have such "proportionable interest and property as his majesty "under his sign manual shall think fit to order and di-

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"rect, in all enemies' property taken in such fortress, "or in the adjacent harbour, *after final adjudication there-* "*of as lawful prize.*" These acts operate as a parliamentary grant of the property of all prizes to the persons therein described, and vest in them, instantly upon the sentence of condemnation pronounced, the property of all prizes taken, subject to the power reserved to his majesty, and to be executed by proclamation, of appointing the shares in which this vested interest shall be distributed. But the objects of the bounty are distinctly defined: they are *British* subjects only, the officers of his majesty's ships of war, in his majesty's pay. The Plaintiff satisfies this description; the Marquis *de Niza* does not. And since these vessels have been pronounced lawful prize to his majesty, the king could not, even by express words, if he had issued a proclamation after the capture of these prizes, have executed the power in favour of a new class of objects not designated by the original grant: if in derogation of this statute, he had by his proclamation expressly declared that the Marquis *de Niza*, by name, was entitled to a share in the proceeds, it would have been of no effect, because the Marquis was not, at the time when the prizes were taken, an officer in his majesty's pay. *A fortiori*, inasmuch as before the capture of these vessels, the proclamation had issued, which defined the very shares and proportions of the flag officers, captains, seamen, marines, and soldiers, serving in the fleet, and had absolutely and irrevocably vested them, it is impossible that any other person should acquire any interest in them. It is true, that this marked distinction subsists between the share of a captain and that of a flag officer; the captain must be actually on board, to entitle him to a share; a flag officer may either be on board, or directing and assisting in the capture. But the flag officer must be such an one as the act describes; he must be in his majesty's pay, and the proclamation

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clamation cannot give it to any others. And since the captures were not effected by vessels under the command of the Marquis *de Niza*, nor was he aiding or assisting by his counsels, there is no pretence to complain of any hardship in the case. As to the claim made of a share in the *Spanish* prizes, nothing can be more preposterous, inasmuch as *Portugal* was not then at war with *Spain*, and express orders were given to the *British* admiral, to employ the *Portuguese* force on such services only as could give no umbrage to the *Spanish* nation, with the exception of the sole case of the *French* and *Spanish* fleets effecting a junction; and the reason given for that exception is, that the *Portuguese* would then be necessitated to act for self-defence; and would be placed in a new relation with the *Spanish* court. If the *English* commander in chief had come to action with the *Spaniards* alone, he was bound to detach his *Portuguese* allies; and he was not even permitted to carry a *Spanish* prize into one of their ports; yet they contend that they are entitled to a share in *Spanish* prizes.

Arguments for the Defendant.—This is not an action brought by the Marquis *de Niza*, nor does the defence rest upon his title merely; but the Plaintiff is bound to establish his title to recover; and if it can be shewn that the Defendant is liable to pay over these sums to any other person whatever, the action fails. He is entitled to retain these sums either in order to satisfy the rights of the Marquis *de Niza*, who has a double claim, 1, by the law of nations; 2, as a *British* admiral; or, 3, in order to satisfy the rights of the crown of *Portugal*, or to discharge the share to which the king may be entitled, either as a droit of admiralty, or in trust for the Marquis *de Niza*, or in trust for the queen of *Portugal*. 1. The Plaintiffs have made a fatal concession in admitting that in certain cases of capture by a conjoint force, the allies would be entitled

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entitled to a share of the prize on other grounds than those of the prize acts and proclamations. Unless, indeed, this had been admitted, it must have been contended that if any *Portuguese* force, however superior in number, had joined the smallest *British* squadron, all the prizes that they might conjointly make would devolve to the *British* captors alone. But the sentence of our Admiralty Courts cannot vest that in the king which is the property of another sovereign state; and the order for service issued to the Marquis *de Niza* declares the destination of the fleet to be for the services of *their* majesties the King of *England* and Queen of *Portugal*, not for the King of *England* alone; nor can the prizes taken by a joint force be his only. In the case of the *Cape of Good Hope*, 2 *Robins*, 281. the criterion of title to prize is laid down to be, whether the ships were to act in a military character or not. It will not be questioned but that the *Portuguese* squadron was destined to act in a military character. But the prize acts in fact do not touch the question, for they provide only for the cases in which the prizes are captured solely by a *British* force, and which on that account are wholly vested in the crown: they do not even purport to regulate the case of capture by the conjoint force of *England* and an ally. It is not true that this Court cannot take cognizance of those rights which are founded on the law of nations; for the law of nations is part of the law of the land. And by the law of nations an ally who co-operates in a capture is entitled to a share in the prize: few authorities, indeed, are to be found on this subject: neither *Vattel*, *Burlamaqui*, or *Puffendorf*, have touched on it. *Grotius*, *de jure pacis et belli*, adduces several instances of an equitable division, *lib.* 3. *c.* 6. *s.* 14. *Post prælium ad Platæas, severè edictum, ne quis de præda privatim quicquam tolleret: deinde præda pro populorum meritis distributa.* And *s.* 24. *De sociis exemplum est in fœdere Romano, quo Latini in prædæ partem*

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partem æquam admittuntur in iis bellis quæ populi Romani auspiciis gerebant. Sic in bello, quod Ætoli gerebant adjutoribus Romanis, Ætolis quidem urbes et agri, Romanis autem captivi et res mobiles cedebant. Post victoriam de rege Ptolemæo, partem prædæ Atheniensibus dedit Demetrius. Upon enquiry made of a civilian (*a*) of the most extensive learning, and whose opinion is entitled to the greatest authority, he states the general rule of law to be, that allies are equally entitled to a share as our own troops, and that the Admiralty Courts recognize in them the same title which they would have if they were the subjects of our king. It is indeed admitted by the Plaintiff, that prizes taken by a conjoint force become the property of the sovereigns engaged in the war. The whole of these prizes, therefore, did not become the property of the King of *England*, nor could be vested in him by the sentence of his own courts of Admiralty, and consequently could not pass by the prize acts, or any other parliamentary grant to *British* subjects only: or if it did vest in him, yet as to the share of his allies, he holds it only as a trustee for them. It is not laid down in any books in what proportion the shares shall be divided; but it is not necessary to look to books for that, the law of nations is reason and common sense; it is that which is just and proper to be done. What is just and fair here? The *English* sent sixteen, and the *Portuguese* four ships; the latter, therefore, are entitled to a fifth part of these prizes, and the Defendant holds one fifth part of the proceeds as a trustee for the Marquis *de Niza* or the Queen of *Portugal.* To which of them it belongs, and how it shall be distributed by the municipal or military law of *Portugal*, it is altogether unnecessary to enquire. The jury were prepared to find distinctly that these ships had been taken by the co-operation of the *Portuguese*, if the Judge had not thought that it was a question of law. And if allies can be en-

(*a*) The late Dr. *Lawrence*.

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titled in any event to a share, in none can there be a claim more strongly founded in justice than the present. The captures were made in the *Mediterranean:* the service of the Marquis was performed in the same seas: if he had not kept at bay that portion of the enemy's fleet which he blockaded, Lord *St. Vincent* could not have detached the capturing ships, nor could single cruizers have kept the seas against the force, which, but for the *Portuguese* squadron, would have been let loose. If it is necessary, to give a title, that the claimants should come into actual engagement, even in a general action, very few ships, comparatively, contribute to the captures that are made. It is found, upon the express testimony of the commander in chief, that but for the co-operation of the Marquis a part of the *British* fleet must have been detached for the service which the *Portuguese* squadron performed: if it had been detached, probably the *English* admiral could never have met and beaten the combined fleets off *Cape St. Vincent;* and this argument is very strong in favour of the claim made on the *Spanish* as well as on the *French* prizes. And although the instructions given to the *English* admiral were, that the *Portuguese* ships should not act against *Spain*, or be employed in any manner likely to give offence to that power, that is a very different thing from not employing the *Portuguese* force at all to the detriment of *Spain.* By preventing a *French* force from coming to the relief of *Spain*, the Marquis facilitated the capture of the *Spanish* property, and was, therefore, entitled to a share of that which was taken; but whether that be so or not, he is at all events entitled to a share of that which was taken from the *French.* It is clear that the Marquis *de Niza* must take a share if he is a *British* flag officer. The meeting between the two squadrons was not accidental, but a preconcerted plan of war, and therefore differs from the case of the conjoint captures by the *Dutch* and *English*, which occurred in 1745, and

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on which occasion the law officers of the crown recommended a treaty to be entered into between the two countries to ascertain their respective claims: but here was an existing treaty by which it was stipulated, that the officers of either power, commanding the smaller number of ships, should be subordinate to the one commanding the larger number, without consideration of their respective ranks. This treaty, therefore, settled the mutual relations of the officers, and virtually made the Marquis *de Niza* a flag officer of Lord *St. Vincent*'s fleet. The captures were made by vessels under the command of Lord *St. Vincent*. He had flag officers acting under him, and amongst others the Marquis *de Niza*, who, although not personally present, was therefore assisting in the capture, in the sense in which our courts have always recognized that word. Since then he serves as a *British* officer: the order which puts him in that situation entitles him, without express words, to all the rights conferred by the performance of the duties of that service, except the right of receiving pay from *Great Britain*. He is to be sent wherever his services are required; he is to be wholly obedient; and it would be hard and unjust that he should have no reward. If the *English* admiral had commanded the smaller number of ships, it would not be heard of in our courts that he should be excluded from all share in the prizes. The case of the *Russian* ship *Ratizan* sufficiently demonstrates this. In that case Admiral *Macbride* shared the prizes taken by the *Russian* ship alone. But even if it were for a moment admitted that no persons can claim under the prize acts but such as are in the pay as well as the employment of *England*, and that the king could not vest a share in the Marquis *de Niza* by his proclamation unless he were an object of the national bounty under those acts, yet if he derives a claim under any other title, the present action must fail. But it is clear that the prize

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acts do not comprehend all cases even of captures effected by a *British* force. They only distribute the property which the king would otherwise acquire *jure coronæ;* they confer no right to that which accrues as a droit of admiralty: and it has been decided that if a prize be made by two captors, one of whom has no title under the prize acts, the other does not therefore acquire the whole, but the share accrues to the king as a droit of the admiralty. 2 *Robinson,* 284, *n.* The *Twee Gesuster,* a *Dutch* ship, was chased by two armed cutters, the *Providence* and *Spitfire,* each manned with sixteen men, (the *Providence* being commissioned, and the *Spitfire* not commissioned, against the *Dutch;*) the *Providence* first reached the prize, the *Spitfire* shortly came up, and immediately afterwards the prize was seized by the *Providence* and the *Spitfire;* the master of the *Spitfire* was put on board, and conveyed her to *Dartmouth.* The Court of Admiralty having pronounced the *Providence* to be the captor, but that the *Spitfire* was aiding and abetting, and having decreed the *Spitfire* to take the half she would have been entitled to in case she had been commissioned against the *Dutch,* an appeal was made on the part of the *Providence:* the king's proctor intervened, and prayed that the share of the *Spitfire* might be condemned as a droit of admiralty: the lords of appeal pronounced for the interest of the king in his office of admiralty, and condemned the prize as taken by the private ship of war the *Providence,* and the non-commissioned ship the *Spitfire;* and directed the same to be shared in proportion accordingly. 2 *Robinson,* 285, *n.* The *Le Franc,* a *French East India* ship, was taken by the *Glatton,* which had no letter of marque, and six other *British East Indiamen* commissioned as private ships of war, in which capture the *Glatton* very essentially co-operated: the proctor of the admiralty appeared for the king in his office of admiralty, praying that such proportion of the prize as would have been condemned

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demned to the *Glatton*, if she had been a commissioned ship, might be pronounced liable to confiscation to the king in his office of admiralty, as a droit and perquisite of admiralty. The Court condemned the prize as taken by the six private ships of war and the *Glatton*, but condemned the *Glatton's* share as a droit and perquisite of admiralty. The case must be the same whether the prize be taken by the co-operation of a non-commissioned *English* ship, or by that of a foreigner: and whether the Marquis *de Niza* be entitled or not, a deduction from the plaintiff's share must be made in respect of the force of the non-commissioned vessels brought into the combat by the Marquis *de Niza*.

Arguments for the Plaintiff in reply.—The claim which has been insisted on as accruing to the Marquis in the character of a *British* admiral cannot be supported, not because he was a *Portuguese*, for that would be no obstacle, but because he was not in the pay of *Great Britain*; which circumstance alone is conclusive that he can take no benefit under the prize acts. In the year 1745, the *Dutch* and *English* fleets having made some conjoint captures, which were reduced into the possession of *England*, the privy council referred it to the law officers of the crown to say, whether under the prize acts and proclamations a share of the proceeds could be distributed to the *Dutch* fleet, which the privy council themselves inclined to think was the proper course; but the law officers were of opinion, that as the act of parliament referred only to ships of war in his majesty's pay, and privateers, that mode of division under the proclamation was not advisable, and that the proceeds should be delivered over to the *Dutch* to be divided by the states general; but that if the *Dutch* ships had had *English* letters of marque, the division might have been made under the proclamation. And although the opinion of the law officers is no authority, it shews what the practice has heretofore been.

Dutch and *English* fleets joint captors, case of, in 1745.

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The concession that in certain events these *Portuguese* vessels might have shared in the prizes, is in no measure prejudicial to the Plaintiff. But to entitle them, there must be an actual co-operation: Did that exist here? In the case of the *Cape of Good Hope*, 2 *Robinson*, 282. it was held, that to entitle vessels to a share in the prize, there must not only be an actual intimidation produced on the minds of the enemy, but that the claimants must have had at the time the consciousness of that effect, and the intention of producing it; and that a fleet of *Indiamen*, whose appearance essentially contributed to the reduction of the enemy, being unconscious of the assistance they gave, were entitled to no share of the spoils: there was no intention or consciousness in the Marquis *de Niza* of any co-operation at the time of either of these captures, which were made in a part of the *Mediterranean* very distant from him. If this can be considered as actual and positive assistance, the stipulation that the *Portuguese* admiral should be so employed as not to give offence to *Spain* was nugatory; for according to the construction contended for, he as much annoyed that nation by every sail that he set, as he could do by actually pointing his guns at their fortresses. The rule has been established between *British* claimants, (and although the question has rarely or ever occurred between claimants of different nations, the same rule must prevail between them,) that if a vessel is within hearing of the guns when another takes a prize, she shall be considered as aiding and abetting; but the Marquis *de Niza* does not establish even that degree of co-operation; his only merits are that the capture was made within the limits of the same sea; and the *Spanish* capture was not in fact made in the *Mediterranean*, though it was within the limits of the *Mediterranean* station, which is now extended as far as *Cape Finisterre*. In the case of the *Forsigheid*, 3 *Robinson*, 317. upon the question whether a

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squadron which had been sent out from the main fleet with orders to keep within signals, were sole or joint captors, Sir *William Scott* thus expresses himself: "The whole case "is reduced to this point, whether these ships are to be "considered as detached or not? Detached, I mean, in "the same manner as detachments are usually made, for "some distinct and separate purpose, which, though pos- "sibly connected with the main service, carries them "out of the scene of common operation for the time? "or whether they were sent only on the look-out, to "preserve their connection with the service of the fleet, "and maintain their dependance on it? To determine "this question, I must look to the orders that were "given: they direct them 'to watch well the motions "of the enemy, to cruize between certain points, joining "the fleet occasionally for communication.' If they "stopped here, I should be inclined to hold that it was "a separate service, with orders to join again: but they "go on,—directing them 'to avoid being at such a "distance, *as not to observe the signals that were made.*' "It is impossible, under these terms, to say that it was "a detached service." It is here admitted, that if they had been sent on a detached service they would have been the sole captors. But whatever may be the merits of the claimant, it is in vain for him to insist on them here. He can recover nothing through the medium of the present proceedings: he must resort to the Court of Admiralty to establish his claims. Neither Lord *St. Vincent*, if he had commanded an inferior force, and the prizes taken had been reduced into the possession of the *Portuguese* admiral, nor Admiral *Macbride*, claiming against the crew of the *Ratizan*, could have maintained an action in the common law courts of this country, for any share of their respective prizes. It is said that although this money might not belong to the Marquis *de Niza*, it does not necessarily belong to the Plaintiff, because

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cause it might be a droit of admiralty. The distinction between the two species of prize was laid down in an order of council (a) made in consequence of a dispute between the king and the Duke of *York*, afterwards King

(a) At the council held at *Worcester-house*, the 6th *March* 1665-6. Present, the King's most excellent Majesty, His Royal Highness the Duke of *York*, His Highness Prince *Rupert*, Lord *Fitzharding*, Lord *Arlington*, Lord *Berkeley*, Lord *Ashley*, Lord Chancellor, Duke of *Albemarle*, Earl of *Lauderdale*, Mr. Secretary *Morice*, Sir *William Coventry*.

Whereas although the long intermission of any war at sea by his majesty's authority, several doubts have arisen concerning the rights of the lord high admiral in time of hostility, the determination whereof appearing very necessary for the direction as well of his majesty's officers as of those of the lord high admiral;—upon full hearing and debate of the particulars hereafter mentioned, the king's counsel, learned in the common law, and likewise the judge of the High Court of Admiralty, and those of his majesty, &c. his royal highness the lord high admiral's counsel, in the said high court of admiralty being present, his majesty present in council was pleased to declare, 1st, That all ships and goods belonging to enemies coming into any port, creek, or road of his majesty's kingdom of *England*, or of *Ireland*, by stress of weather, or other accident, or by mistake of port, or by ignorance, not knowing of the war, do belong to the lord high admiral; but such as shall voluntarily come in, either men of war or merchantmen, upon revolt from the enemy, and such as shall be driven in and forced into port by the king's men of war, and also such ships as shall be seized in any of the ports, creeks, or roads of this kingdom or of *Ireland*, before any declaration of war or reprisals by his majesty, do belong unto his majesty.

2dly, That all enemy's ships and goods casually met at sea, and seized by any vessel not commissionated, do belong to the lord high admiral.

3dly, That salvage belongs to the lord high admiral for all ships rescued.

4thly, That all ships forsaken by the company to them, are the lord high admiral's, unless a ship commissionated have given the occasion to such dereliction, and the ship so left be seized by such pursuing, or by some other ship commissionated, then in the same company, and in pursuit of the enemy. And the like is to be understood of any goods thrown out of any ship pursued.

Extracted from the registry of His Majesty's High Court of Admiralty in *England*.

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James the second, then lord high admiral of *England*, which took place in the year 1665; wherein it is declared, that all ships which shall be driven and forced into port by the king's men of war, and also such ships as shall be seized in any port, creek, or road, of this kingdom, before any declaration of war or reprisals by his majesty, do belong to his majesty; but that all enemy's ships and goods casually met with at sea, and seized by any vessel not commissionated, do belong to the lord high admiral. It is impossible that these ships, or any part or share in them, can be droits of admiralty, for two reasons: First, the *Glatton* and the *Spitfire*, when they earned droits of admiralty, were actually assisting in the captures: the *Portuguese* force was not. Secondly, these captures were made by ships commissioned by his majesty, and by them exclusively. By what ships the prizes were taken, is always marked on the sentence of the Court of Admiralty. The language of the sentences varies with the occasion. Where a prize is decreed to the owners of privateers on letters of marque, it is condemned as "lawful prize," following the phrase of the prize acts: where a prize is taken by a commissioned officer, it is condemned as lawful prize to his majesty: where by a non-commissioned vessel, it is pronounced to be confiscated to his majesty in his office of admiralty, as a droit and perquisite of admiralty. If any part of these prizes had been a droit of admiralty, that would have stood in the situation of a separate prize taken by the non-commissioned ship, and it would have been distinctly marked on the face of the sentence, as in the cases cited; but the sentence in this case condemns the captures as good and lawful prize to his majesty, taken by his majesty's ships the *Centaur* and the *Alcmene*; and that being so, the sentence is conclusive on that point, that it is no droit of admiralty. It has been decided in numerous insurance cases, both in the House of Lords and in *Westminster* hall, that the courts are bound by the sentence of a foreign

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foreign court of admiralty, even though it may have proceeded on the most erroneous grounds (a); and surely not less credit is due to a decree of our own prize court. If the Marquis *de Niza* had intended to insist that this was a droit of admiralty, he should have applied to the court of prize to condemn it as such; and if that had been so decreed, he probably would have had no difficulty in obtaining a grant of it from the crown. It cannot be contended that the Marquis *de Niza* is entitled, without impugning the subsisting sentence of the prize court, against which this action is in effect an appeal; but it is an appeal brought where there is no appellate jurisdiction to review the decisions of that authority, which hath competent, nay exclusive, cognizance of the subject.

Mansfield C. J. This is a very extraordinary case, of such a nature as has never before occurred, and is not very likely to occur again; and as there is no hope that any further argument can throw more light on the subject, we may as well dispose of it now. The plaintiff brings his action against a navy agent for his supposed share of a prize which the agent has in his possession. In this court nothing can be looked to in order to decide on this claim, except the prize acts, and his majesty's proclamation. The foundation of the plaintiff's claim is the prize acts. Looking at the words of those acts, they seem to admit scarcely any doubt of their meaning as applied to the present question. There are two acts of parliament, of the 33d and 37th years of his majesty; and they enact, that the flag officers, commanders, and other officers, seamen, marines, and soldiers, on board every ship and vessel of war in his majesty's pay, shall have the sole interest and property in all ships thereafter to be taken during the continuance of hostilities, after the same shall have been adjudged lawful prize to his

(a) See *Bolton* v. *Gladstone*, *post*, 20th *June* 1809.

1 majesty,

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majesty, in any of his majesty's courts of admiralty, to be divided in such proportions as his majesty by his proclamation hath directed or shall direct. Under these acts, then, the property in all prizes is absolutely vested in the *British* captors, when his majesty's proclamation shall once have regulated the distribution of the shares. In the proclamation, as the case truly states it, his majesty speaks of all prizes the right whereof is inherent in *our crown*, and gives them to the captors. His majesty proceeds to direct that the nett produce of all prizes taken by *our* ships and vessels of war, shall be for the entire benefit and encouragement of *our* flag officers, captains, commanders, and other commissioned officers in *our* pay, and of the seamen, marines, and soldiers serving on board *our* said ships and vessels at the time of the capture, after the same shall have been finally adjudged lawful prize. His majesty then regulates the distribution as follows. To the captains of such ships and vessels three-eighths; but in case the prize shall be taken by any of *our* ships under the command of a flag, the flag officer shall have one-eighth; if only one flag officer, he shall have the whole; if two, the chief shall have two-thirds, and the other the residue; if more than two, the chief shall have one-half, and the others shall equally share the residue. The whole of these acts and proclamations, then, relates to captures solely made by *British* ships, and *British* officers, and has no relation to captures made by foreign ships, and foreign officers not in the pay of his majesty; nor is it possible to imagine that the legislature would have been so absurd as to make regulations for the division of prizes taken by a joint force, which must depend upon the law of nations, or if there is no law of nations which decides this question, then upon positive treaties. Perhaps our allies might not think fit to submit to our legislative acts. The plaintiff's claim, as a flag-officer, is clear, unless the Marquis *de*

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Niza can interpose. Upon what title is he to do that? Clearly not on the prize acts and proclamations. But it is said he rests his claim on the law of nations. That law has never yet been stated; but if one might guess at it, it must be in the ratio of the strength of the respective captors; to know which, the number of guns, weight of metal, number of men, and strength of each fleet, must be stated; of all which particulars this case says nothing. It is impossible, then, to settle here the share of the Marquis *de Niza*. There is no criterion by which to ascertain what share he is to have, even if we were to hold that he had been actually assisting in the capture. But it is said his share must be reserved in the hands of the Defendant. Could he claim that share in this court as a Plaintiff? No: he must claim it in the Court of Admiralty; because there the claim is *in rem*, and the proceedings are of that nature that the conflicting claims of all the officers, the whole fleet, and every one interested, may be brought into discussion against him. This court can hold no such cognizance; yet we are called on to decide, *ex parte*, a question in which all the admirals, captains, and sailors of the fleet are interested. It is necessary, therefore, that the Marquis *de Niza* must resort to that jurisdiction where such claims may be discussed. It is urged that he assisted in the capture: if he did assist, he should have preferred his claim in the Court of Admiralty; but he has made no such claim: the facts of the case, however, shew that he never did assist at all. But it is said, that under the proclamation he is entitled as admiral. That is not so: the proclamation, it is true, does not require a flag officer to be actually assisting in the capture; but in order to prevent disputes on the question, whether a flag officer were actually assisting or not, the rule has prevailed, that to entitle a flag officer to a share, it is sufficient that he be in the fleet. But if the Marquis *de Niza* alone had taken a ship, this prize act

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act and proclamation would not have interfered to give our flag officers any claim other than they would have had by the law of nations. In this court, therefore, we can find no rule upon which we can regulate the share of the Marquis *de Niza*, or give judgment for the Defendant. If the Marquis has a right to any share at all, he must go into the Court of Admiralty: he could not maintain an action for the sum now contended to be due to him.

HEATH J. I am of the same opinion; and my lord has very fully stated the principles on which this case rests. This is an action for money had and received to the Plaintiff's use. The question is, how it came into the hands of the Defendant? Under the prize acts and proclamations; and upon looking at them, it does not appear that either the Defendant or the Marquis *de Niza* is entitled to any share of the money: if the Marquis *de Niza* had had any claim, he should have appealed from the sentence of the Court of Admiralty at *Gibraltar* to a higher court. In the case of *Lord Nelson* v. *Tucker*, 4 *East*, 238., which was cited in favour of the Defendant, the question was between the conflicting rights of flag officers, and the claim was made under the prize acts and proclamations. It therefore appears to me, that the Defendant has no right to retain this money, and that the judgment must be for the Plaintiff.

LAWRENCE J. I am of the same opinion. If the sentence of the Court of Admiralty is not that from which the right of the parties flows, we have nothing to do with the question. Lord *Mansfield* has said, "the only question was, who were the captors: that was not a fact to be alleged in pleading, and to be proved accordingly, but was to be seen upon the face of the sentence of the Court of Admiralty." That being so, we can look only

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at the sentence of the Court of Prize, to see whether we have any thing to do with the question. If that sentence and the prize acts have vested the property in any particular person, we must look to them only in order to see whether any other person is entitled to take it out of his hands. The act speaks ot officers in the king's pay: the Marquis *de Niza* is not in the king's pay. It is said that he virtually co-operated in the capture: but the question does not depend upon his co-operation, but on the prize act and proclamation. But it is said the Marquis *de Niza* is a rear-admiral, and therefore entitled to a flag officer's share: he may be such, but that will not entitle him; for the words of the proclamation give the share of the captains to such captains who shall actually be on board at the taking of any prize, and the share of a flag officer to such flag officer or flag officers who shall be actually on board at the taking of any prize, or *shall be directing or assisting therein*; but it does not appear that either Captain *Markham* or Captain *Digby* was under the command of the Marquis *de Niza*, or at all directed or assisted by his counsels; and if they were not, then the Marquis is not entitled as a rear-admiral under the prize acts and proclamations, and consequently the Defendant is not entitled to retain this money.

CHAMBRE J. I am of the same opinion entirely. We have no jurisdiction to enquire into the rights of the parties, otherwise than as we derive the knowledge of them from the sentence of the Court of Prize, the prize acts, and the proclamations. Upon sentence pronounced, those acts and proclamations decide to whom the shares shall be distributed, and that is wholly to *British* officers. As to the share to be given to persons virtually co-operating, it depends only on the proclamation. There may be good political reasons to divide a share among those officers who only virtually co-operate; it may be done

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done in order to prevent discontents, or to prevent officers from feeling a temptation to desert their station; but it is no rule of distribution to persons who, like the claimant in the present case, do not come within the beneficial operation of the prize act. There was no actual co-operation here, in the taking of these particular prizes; and if there had been any, the Court of Admiralty should have so decided.

Judgment for the Plaintiff.

Best on a subsequent day moved at the request of the *Portuguese* ambassador, that this case might be turned into a special verdict; but the Court seeing no reason to doubt the grounds on which they had determined, observed that though a foreigner suing in our courts is entitled to equal justice with a subject, he has no claim to a greater measure of indulgence than a subject could have: and that the case, which, indeed, ought never to have come into this court, had been so fully discussed on the two arguments, that there was no reason to encourage further litigation on the subject; and they refused the application.

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A sale of growing turnips, no time being stipulated for their removal, and the degree of their maturity not being positively found is a sale of an interest in land, within 29 *Car.* 2. *c.* 3. *s.* 4. and must be in writing.
An auctioneer is an agent lawfully authorized by the buyer to sign a contract for him.
Whether it be for a purchase of an int. in land,
Or of goods.
His authority is given by the buyer bidding aloud.
If an interest in land be of the value of 20*l.* an agreement for it requires an agreement stamp.
If on a sale by auction the same person is declared the highest bidder for several lots, a distinct contract arises for each lot; and although all the lots together amount to a greater value than 20*l.* no stamp is required if the lots were separately of less value than 20*l.*

THIS was an action of *assumpsit* for not carrying off from the Plaintiff's land certain lots, to wit, 27 different lots of turnips, alleged to have been bought by the Defendant of the Plaintiff, and for not bringing back and laying upon the land a certain quantity of manure: the declaration also contained a count for turnips bargained and sold, and the common money-counts. The Defendant pleaded the general issue. Upon the trial at the *Westmoreland* Spring assizes 1808, a verdict was taken for the Plaintiff for the amount of the damages stated in the declaration, subject to a reference as to the amount of the Plaintiff's demand, for which sum only a verdict was to be entered, and also as to the fact whether one *Moss*, who attended at an auction on behalf of the Defendant, and there purchased the turnips for him, had been duly authorized by the Defendant to act as his agent on that occasion. Upon both these points the arbitrator afterwards duly made his award, thereby fixing the amount of the Plaintiff's damages at 46*l.* 6*s.*, and declaring that *Moss*, a servant in husbandry, retained and employed by the Defendant, was duly authorized by the Defendant to attend as his agent at the sale. The verdict was also made subject to the opinion of the Court of Common Pleas upon the following case.

The Plaintiff put up to sale by public auction, on the 25th of *Sept.* 1806, a crop of turnips, then growing upon his land, in separate lots, and under certain conditions of sale. The Defendant, by his agent *Anthony Moss*, his farming servant, attended at the sale, and being the

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highest bidder for 27 different lots, containing in the whole 108 stiches (a) or furrows, was declared to be the purchaser thereof; and the name of each purchaser, and amongst others, of the Defendant was written in the third column of the sale bill by the auctioneer, opposite to each particular lot for which the other purchasers and the Defendant were respectively declared the highest bidders, in the order in which the same were respectively knocked down. The Defendant was not present at the auction; neither did he, or *Moss*, sign any agreement in writing, nor did the auctioneer, otherwise than as is before stated, by putting down the names of the different purchasers, amongst whom was *Moss* for the Defendant. The lots were not purchased by the Defendant's agent in succession, but other purchasers purchased several intermediate lots. No single lot was knocked down to the Defendant at a larger sum than 1*l.* 11*s.*, although the amount of the 27 lots was 39*l.* 1*s.* The following was the form of the bill of sale prepared by the auctioneer, and by which the turnips were sold. It was divided into five columns.

A bill of sale of turnips, by stiches, the property of *George Emmerson*, at *Kirby*, in the parish of *Bongate*, in the county of *Westmoreland*, that were sold the 25th of *September* 1806, by *John Wright*, auctioneer. Time for payment till the 1st day of *January* 1807, on giving satisfactory security before they depart the sale, or when demanded. Every four stiches one cart load of manure.

1.	2.	3.	4.	5.
No. of Stiches.	No. of Lots.	Purchasers' Names.	Articles sold.	Price.
4.	1.	Edw. Heelis.	Lot 1.	1*l.*7*s.*

(a) Στιχοι. The turnips were raised in the drill husbandry, a single row being sown along the summit of a two-furrow-ridge, with intervals between the ridges for a horse-hoe to pass and earth them up: each of these ridges was called a stich.

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The bill of sale was proposed at the trial, as evidence of the contracts of sale of the 27 lots, but it was not proved: there was no stamp on it, but it did not in any manner appear that there was any fraud or intention to elude the stamp act in setting down each lot separately. The question for the opinion of the Court was, whether the verdict should stand, or a nonsuit be entered.

Lens Serjt., for the Plaintiff, stated that there were in this case three questions: 1. Whether, the several lots of turnips being sold by auction, and being bought by several persons, all the lots bought by one person were comprehended in one contract, or in several contracts; 2. Whether the sale of the turnips growing conveyed an interest in land; or, 3. Whether the turnips growing were goods to be bargained and sold. As to the first point, he contended, that at every fall of the auction hammer, there was a distinct contract; and between the lots which the Defendant purchased, purchases made by other persons intervened. The statute 44 *G.* 3. *c.* 98. *schedule* A. *p.* 189., which imposes a stamp duty on agreements under hand, imposes it only "where the matter thereof shall be of the value of 20*l.* and upwards:" this duty, indeed, attaches on those agreements of which the subject is an interest in land, as well as on others; but there is an especial exception of all contracts for or relating to the sale of any goods, wares, and merchandizes. Neither of the contracts singly was for a matter of the value of 20*l.* and therefore, whether they were for an interest in land or not, yet as they were distinct bargains, they did not require a stamp. But, secondly, this was merely a sale of goods, wares, and merchandizes, and consequently, according to the case of *Simon* v. *Metivier*, 3 *Burr.* 1921. the signing by the auctioneer was a sufficient signing by an authorized agent: at all events it was not a contract for

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any interest in land, and did not on that ground fall within the requisitions of the statute. No interest whatever in the land was intended to pass by this sale. It is distinguishable from all the cases which have been decided on that subject. It is not like the sale of growing grass, in the case of *Crosby* v. *Wadsworth*, 6 *East*, 602.: there, by the terms of the contract, the grass was to continue growing till it was ripe and fit to cut: that was a grant of the whole vesture of the land. In *Burt* v. *Moore*, 5 *T. R.* 329. and the other cases upon the letting of dairies, it has been held that this is such an exclusive possession as would enable the tenant to maintain trespass. But in the present case the contract gave the purchaser no exclusive possession: if he had entered to take the turnips, and the vendor had brought trespass, he could not have pleaded the general issue and given this title in evidence under the plea of not guilty: he must have pleaded this contract as a licence to enter for an especial purpose, merely to take away what he had bought. In 1 *Lord Raym.* 182. *Treby* C. J. held that a sale of timber growing on the land need not be in writing by the statute of frauds, but might be by parol, because it is but a bare chattel. [*Mansfield* C. J. observed that if tenant in tail, or an ecclesiastical person, sells timber standing, and dies, the purchaser shall not cut it in the time of the issue in tail, or successor.] In that case it ceases to be a mere chattel, because the vendor cannot give licence to enter after his death to cut it. It is not a fruit fallen during his estate, but remains fixed to the inheritance. But here the inheritance continues in the vendor, as it did in the case in Lord *Raym.*: but even in the case put, as between the vendor and vendee, the timber can only be considered as a mere chattel. And the authority of *Crosby* v. *Wadsworth* is not inconsistent with Lord *Raymond*'s. In answer to a question put by *Heath* J. he admitted, that if by the contract the turnips

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had been permitted or required to be fed off, that might have been an interest in land, like the first tonsure or first vesture. In the case of *Waddington* v. *Bristow*, 2 *Bos. & Pull.* 452., which was recognised by Lord *Ellenborough* C. J. in *Crosby* v. *Wadsworth*, the contract went to over-reach the produce of the land for a considerable time, and was made long before the hops contracted for were in existence: here the turnips were actually ripe and fit to be drawn: it was not necessary, in order to give the fullest effect to this contract, that any interest in the land should pass. If this sale had been made in so early a stage of their growth (*a*) that the hoeing yet remained to be done, and the roots had not yet attained their full size, the case might have been different. The criterion whether the contract comes within the statute of frauds, is, whether it is a sale of things *in esse*, or of things to be created hereafter, as in the contract for a chariot to be built. *Towers* v. *Osborne*, *Str.* 506. [*Lawrence* J. observed that in *Rondeau* v. *Wyatt*, 2 *H. Bl.* 63., the Court determined that the case of *Towers* v. *Osborne* was out of the statute, not because it was an executory contract, as it had been argued in that case, but because it was for work and labour to be done, and materials and other necessary things to be performed, which was different from a mere contract of sale, to which species of contract alone the statute was applicable.] If this is not a contract for the sale of goods, but for something to be done, there is nothing in the statute of frauds which requires it to be in writing. Analogies might be drawn from the nature of emblements, which go to the executor, and not to the heir, favourable to the case of the Plaintiff. If, however, this be an interest in land, the question remains whether the signature of the auctioneer be a sufficient signing. It is true, that in the case of

(*a*) See note (*a*), *post*.

Standfield

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Standfield v. *Johnson*, 1 *Esp.* 101., *Eyre* C. J. held, at *nisi prius*, that it was not. In *Buckmaster* v. *Harrop*, 7 *Ves. Jun.* 344. that case was recognized, and it was there said that the same thing was ruled in the case of *Walker* v. *Constable*; but that point does not appear reported in 1 *Bos. & Pull.* 306. But in the case of *Coles* v. *Trecothick*, 9 *Ves. Jun.* 349., although, indeed the point there came only incidentally before the Court, Lord *Eldon*, Chancellor, expresses a very strong opinion that an auctioneer is a sufficient agent; and that it was impossible to hold otherwise, and at the same time to leave the case of *Simon* v. *Metivier* undisturbed. He says, "much perplexity has arisen by the case of auctions; "for in *Simon* v. *Metivier*, it was held, as to goods, that "the auctioneer taking down the name was a signing "within the statute; and it is very singular, that after, "and without disturbing that, it was held by Lord Chief "Justice *Eyre*, at *nisi prius*, that it would not do as to "land. Why not? The form of the two clauses is not "the same; but the terms of the memorandum in writing "are exactly the same."

Shepherd Serjt. *contrà*. The Plaintiff is not entitled to sustain this verdict. The contract is for a sale of turnips by stiches; the thing sold is growing on the land; it is measured by the extent of land which it covers: for every four stiches a cart-load of manure is to be brought on the land, besides the price in money. This, then, is an interest in or concerning land. The case is not distinguishable from that of *Crosby* v. *Wadsworth*. Both crops are sold in a growing state, no time is limited for clearing them off, and it is at the option of the purchaser whether they shall continue to grow a day or a week. So in *Bristow* v. *Waddington*, the hop contract was held to be an interest in land. An attempt is made to distinguish the present case from that, on the ground that there

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there the hops had not appeared above ground at the time of the contract; but this is a stronger case than that; for there the hops were to be gathered by the seller. Would it have altered the nature of this contract, if the sale had taken place when the turnips were a month younger, so that by an additional month's growth they would have become more valuable before they were consumed? or does it even appear on this case that they would not have become larger and more valuable by standing another month after the sale? (a) If the seller had stipulated to draw and deliver them, perhaps he might have made this a contract for the sale of goods; but the contract, as it now stands, is for an interest in land. To a question put by *Mansfield* C. J. he answered, that if a rick of hay had been sold, to be taken away by the buyer, he could not indeed contend that the buyer had an interest in the land on which it stood: but that case was rather parallel to the case of goods deposited in a warehouse, which clearly gave no interest in the warehouse: but here the turnips were daily growing and deriving an accession of value from the freehold. It is exactly the case of the timber, which, speaking with mathematical correctness, receives an increase every day that it stands: [*Lens* admitted this.] But the case in Lord *Raymond* cannot be law; and after some late decisions, if the question were again to occur, it would be held necessary that such a contract should be in writing; and if writing be necessary, a stamp would be necessary also. This, then, not being a contract for the sale of goods, for want of a stamp is not binding. But if it were a sale of goods there is no sufficient signature on the part of the seller.

(a) In a later case, *Parker* v. *Staniland*, 11 *East*. 363. the Court of King's Bench determined that a sale of potatoes in the ground, which were come to full maturity, and were to be taken up immediately, did not pass an interest in land.

Various

Various reasons have been assigned for the decision in *Simon* v. *Metivier*, but none of the subsequent cases have recognized that it was well decided, if it goes to establish the broker's agency for the buyer: the cases only say, that an auctioneer is not the buyer's agent in a purchase of land. [*Mansfield* C. J. Perhaps it is a great misfortune that that case was not overturned before any others were decided on it; but it has again and again been acted on. *Lawrence* J. In 7 *E.* 569. *Hinde* v. *Whitehouse*, Lord *Ellenborough* C. J. said that "In respect "to sales of goods, it had been uniformly holden that a "broker was an agent of both parties ever since the case "of *Simon* v. *Motivos*; and it would be dangerous to "break in upon a rule which affects all sales made by "brokers acting between the parties buying and selling." It is impossible to say how many hundred thousands of pounds may at this moment depend on that case.] *Shepherd* admitted that he had heard Lord *Eldon* C. J. rule the same point at *nisi prius*, and abandoned that position. But this is not a contract for goods merely: in *Waddington* v. *Bristow*, Lord *Alvanley* C. J. held that the picking and cleansing of the hops was something more than the sale of goods; so the bringing on the dung on the land is something more than the mere sale of goods; and although the statute of frauds might not require that a contract for manure, or for work and labour, should be in writing, yet if the parties will reduce it into writing, a stamp becomes necessary; for this is an entire contract relating to a subject of greater value than 20*l.* and it would be a fraud on the revenue to cut it down into a number of smaller sums. [*Heath* and *Chambre* Js. observed that the case especially found that there was no fraud, and that as soon as the purchaser had bought the first lot there was a complete contract, which could not be avoided by his buying another lot. *Mansfield* C. J. Each buyer had a complete right of action after he was declared the purchaser

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chaser of each respective lot.] The Plaintiff has declared on one entire contract; and that could not be complete till the end of the whole sale; and even if there were separate contracts entered into at the respective moments of purchasing the several lots, yet if after the sale was over the parties had reduced the whole matter into writing, it would have been one entire contract for the sale of the whole quantity, and the law must be the same, although they should reduce the sale to writing after each separate lot.

Lens in reply observed, that no stamp was rendered necessary by the circumstance that the contract was for a sale of goods and something more, for that the exception in the stamp act was for agreements *relating to the sale of goods* (*a*), and if a sale of goods was an ingredient in the contract, it did not matter what else might be contained in it: and besides, whether the seller was to receive the consideration for his goods, wholly in money, or partly in money and partly in manure, must be quite immaterial. The argument supposed, that the stipulation to bring on the manure was a separate contract; but it was a part of the same contract. Although the Plaintiff stated an entire contract in his special count, he failed to prove it, and the verdict was not taken on that count, but on the count for goods bargained and sold. [*Chambre* J. observed, that on a count for goods sold, the Plaintiff may give evidence of as many different contracts as he will.]

Cur. adv. vult.

On a following day in the same term, the Court observed, that the statute of frauds did not require that the agent for the buyer should be authorised by writing;

(*a*) Acc. per *Le Blanc* J. *Warrington* v. *Furbor*, 8 *East*, 241.

and

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and in the case of *Coles* v. *Trecothick*, and numerous other equity cases, a written authority had been held unnecessary, although the contrary had been once ruled; if the Defendant had subscribed his own name in the third column opposite to each lot as it was knocked down to him, no doubt the contract would have been good; or if he had expressly said to the auctioneer, put down my name.

MANSFIELD C. J. in this term delivered the opinion of the Court. He observed, that some curious points had been agitated in this case, and recapitulated the facts. The questions are, whether the contract should be in writing, as being for a sale of goods amounting to 10*l*. There is no ground for that objection, for the contract for each stich was a separate sale: for the same reason no stamp is necessary, because no one lot was worth 20*l*. The third question is, whether it was an interest in land, and if so, whether a signing by the auctioneer is a signing by an agent for the purchaser: this depends on the 4th section of the statute, for this is an agreement to purchase. The words of the statute are, "that no action shall be "brought to charge any person *upon any contract or sale* "*of lands*, tenements, or hereditaments, *or any interest* "*in or concerning them*," unless the agreement, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. Now as to this being an interest in land, we do not see how it can be distinguished from the case of hops decided in this court: and if the auctioneer is an agent for the purchaser, then the statute of frauds is satisfied, because the memorandum in writing is signed by an agent for the party to be charged. Now this memorandum is more particular than most memorandums of sale are; and upon it the auctioneer writes down the purchaser's name. By what authority does he write down the purchaser's name? By the authority of the purchaser. These persons bid, and announce their biddings,

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biddings, loudly and particularly enough to be heard by the auctioneer. For what purpose do they do this? That he may write down their names opposite to the lots; therefore he writes the name by the authority of the purchaser, and he is an agent for the purchaser: and it does seem, therefore, that this is a contract signed by an agent for the purchaser, and consequently is binding; and judgment must be entered for the plaintiff.

Note, It was not mooted on the part of the Defendant, whether *Moss*, being himself only an agent for the Defendant, could delegate his authority to the auctioneer.

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CHESSELL *v.* PARKIN.

Notice of motion served after nine at night is no notice.

ONSLOW Serjt. on the last day of *Easter* term moved for judgment as in case of a nonsuit. It appeared that the notice of the motion had been given to the Plaintiffs after nine o'clock on the preceding evening. The court held that this was not sufficient notice, and refused the rule: upon due notice given, the rule *nisi* was now granted.

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VALENTINE *v.* GULLAND and Others.

June 8.

If a prisoner on mesne process gives a warrant of attorney, the rule that his attorney must be present, is not dispensed with, though two other sureties not in custody join in the warrant.

BEST Serjt. had obtained a rule *nisi* to set aside an execution, and the judgment which had been entered upon a warrant of attorney, given for securing a debt of *Gulland* to the Plaintiff, by *Gulland*, *Knight*, and *Rankin* jointly, at a time when *Gulland* was in custody on mesne process, and when, as it was sworn, no attorney on his behalf was present. *Shepherd* Serjt., in shewing cause, observed that it had been decided in the case of *Crompton* v. *Steward*, 7 *T. R.* 19., that the rule of court did not apply to cases where the Defendant was detained in execution, but only to cases of mesne process; and he said that the exception extended to those cases where other persons who were not in custody had joined in the warrant as collateral securities.

The Court, however, did not assent to this latter doctrine, and made the rule absolute to set aside the judgment and execution as against the principal only, leaving it to stand as against the sureties.

BARTON *v.* HANSON, STOCKWELL, WILLIAMS, SIMCOCK, and TIBBS.

June 8.

If several persons horse with horses their several property, the several stages of a coach, in the general profits of which they are partners, they are not all jointly liable for goods furnished to one partner for the use of the horses drawing the coach along his part of the road.

THIS was an action brought to recover the price of some hay and corn, which appeared by the evidence given upon the trial, at the *Lent* assizes 1809 for the county of *Kent*, before *Macdonald* C. B., to have been

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furnished by the Plaintiff under the following circumstances. The Defendants between them were generally concerned as proprietors of a stage coach, running from *Hastings* to *London*. They divided the road between themselves into different quarters; and the separate proprietors were severally the owners of the horses which drew the coach through their respective districts, and of the harness; and severally provided their stabling, food, and horsekeepers in those districts. The Defendants *Hanson* and *Tibbs*, were the proprietors of the horses which drew the coach in the *Lamberhurst* quarter. *Hanson* occupied a stable at *Lamberhurst*, of which the Plaintiff was the owner, and a farm, on which the horses were employed in husbandry business at times when they were not drawing the coach. None of the other partners had any property in these horses, or contributed to furnish them with corn or hay. The goods in question were delivered for the use of these horses at the stable at *Lamberhurst*, and the Plaintiff had received part of the price by a bill which he drew on *Hanson* and *Tibbs* solely. It was also proved, that *Hanson* being unsuccessful, the Plaintiff expressed his fears that he should not get paid the residue. The Defendants proposed to prove that it was notorious on the road that the separate Defendants horsed the separate stages, and that the tradesmen along the road gave credit to the Defendants separately for whatever goods they furnished. But the Judge held that evidence of these facts was not admissible. The profits arising from the coach were divided among the Defendants in proportion to the number of miles which they respectively drew it. *Best* Serjt. for the Defendants contended, on the authorities of *Savile* v. *Robertson*, 4 *T. R.* 420. and *Coope* v. *Eyre*, 1 *H. Bl.* 37., that the Defendants were not all jointly liable, and that the Plaintiff, therefore, must be nonsuited; but the Judge left it to the jury to decide, whether the plaintiff gave credit

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credit to *Hanson* and *Tibbs* only, or to the whole concern, for that the particular arrangement made between the partners might not be notorious to all the world; and since all the parties proportionably shared the general profits of the business, all might be liable to pay for the goods furnished for the purpose of producing that profit; and it was more probable that the Plaintiff should be willing to give credit to the whole concern, than to a particular individual. The jury found a verdict for the Plaintiff.

Lens Serjt. now shewed cause against the rule which *Best* had in the last term obtained, for setting aside the verdict, and entering a nonsuit, or having a new trial. This mode of subdividing the work of a coach on a long road is very common: the partners agree among themselves who shall horse particular stages, and they often shift them; but the effect, as relating to others, is not such but that the persons who supply goods supply them to the whole concern; and the entire partnership, which has the benefit of them upon every adjustment of the partnership account, pays for them as part of their general outgoings. And this, he suggested, was the mode of conducting the business between these partners.

The Court, without hearing *Best,* were clear that the evidence, as stated, left no ground for this supposition. The utmost that could be said upon it in favour of the Plaintiff was, that he let the horses to the concern for this stage; but if his argument was founded on the ultimate mode of making up the accounts between the partners, he could at present proceed no further: for that fact did not appear.

Rule absolute for a new trial.

1809.

June 8.

Rolf v. Dart.

To prove a copy of a record, it is sufficient to prove that the paper agrees with what the officer of the court read as the contents of the record: it is not necessary for the persons examining to exchange papers and read them alternately, as in another case.

IN replevin, tried at the *Westminster* sittings in term, before *Mansfield* C. J., the Defendant avowed as bailiff to *Edmund Hill*. In order to shew that *Hill* was the landlord, *Shepherd* Serjt. proposed to give in evidence a copy of a judgment in replevin between the same parties, obtained in the preceding year, upon an avowry for rent of the same premises. The witness who produced the paper being asked by *Best* Serjt. how he knew it was a copy, said, that he read the paper while the officer of the court held and read aloud the record to him; and that the contents of the paper agreed with what the officer read. The copy was then admitted: and upon this evidence a verdict passed for the Defendant, and no motion was ever made to set it aside. The same point was solemnly determined upon argument in the *Exchequer* in a late case, *Reid* v. *Margison*, 1 *Camp.* 469. wherein *Shepherd* argued *totis viribus* that this was not a sufficient proof of the copy of a judgment, and *Best*, *contrà*, contended that it was.

June 8.

Doe, on the demise of Wood, Bart. v. Morris.

A copyholder licensing his lessee to commit waste on condition of his doing a subsequent act to diminish the damage thereby occasioned, cannot eject him for a forfeiture incurred by his committing the waste without performing the subsequent act.

THIS ejectment was brought to recover possession of 80 acres of copyhold land, parcel of the manor of *Ryegate*. Upon the trial before *Heath* J. at the *Surry* *Lent* assizes 1809, the Plaintiff proved that the Defendant had paid rent to his lessor, and that he had dug pits

in

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DOE, Lessee of WOOD, v. MORRIS.

in the premises for the purpose of getting fuller's earth, and had not filled them up again. The steward of the manor proved that there was no custom within the manor entitling copyholders to dig fuller's earth, and that this act of waste had been presented in the manor court as a forfeiture of Sir *Mark Wood's* estate to the lord of the manor. The Defendant's title was stated to rest on an agreement between a person named *Briant*, of whom Sir *Mark Wood* had purchased the estate, and the Defendant, by which *Briant* agreed to grant *Morris* a lease of the premises for twenty-one years, if the licence of the lord of the manor of *Ryegate* could be obtained, and that he would use his best endeavours to obtain such licence; and that in the mean time, until it could be had, it should be lawful for the Defendant peaceably and quietly to enjoy and occupy the premises. And *Briant* agreed that he would obtain a licence for *Morris* to dig fuller's earth on the premises, and that it should be lawful for him to dig fuller's earth, filling up the holes again. The Defendant having dug, and not having filled up the holes, the Plaintiff insisted that this omission was an act of waste; and that, as it would have determined the lease if the licence had been obtained, and the lease actually granted, so a court of equity would not now decree a performance in specie, and even the equitable estate likewise was determined, so that at all events he was clearly entitled to recover at law. It was objected, on the part of the Defendant, that *Briant* had no power to grant such a licence as this; for that it would have been waste in himself to dig this earth, and the waste was committed by the digging, not by the omitting to fill up the holes, and the under-tenant dug the earth by the lessor's own licence, who could not therefore insist on the forfeiture. *Heath* J. nonsuited the Plaintiff, reserving the point.

Lens

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Doe, Lessee of Wood, v. Morris.

Lens Serjt. had obtained in *Easter* term a rule *nisi* to set aside the nonsuit, and have a new trial. He moved on another ground; he supposed that the plaintiff had been nonsuited on the idea that this agreement amounted to a covenant not to turn out the Defendant: to combat which, he urged that this agreement did not amount to a lease for a longer time than a year, *Doe dem. Coore* v. *Clare*, 1 *T. R.* 741. and was therefore not a forfeiture for the want of the lord's licence to lease; and as it was no lease to one intent, neither was it to another, and it conferred purely an equitable estate, which, according to the more recent authority of *Doe dem. Hodsden* v. *Staples*, 2 *T. R.* 684. over-ruling Lord *Mansfield*'s former decisions, could not be set up in an ejectment in answer to the legal title of the lessor, who in this case had given notice to quit. The court admitted the position: but it appeared that the Plaintiff had not at the trial made that point, nor gone upon that title, for which two reasons were assigned; first, because the time mentioned in the notice to quit had not expired when the ejectment was brought; and next, because the Plaintiff's lessor apprehended that a court of equity would re-instate the Defendant; therefore that point did not arise: and as to the principal point, on which the rule was granted, the Court on this day, upon cause shewn by *Shepherd* Serjt., were clear, without much discussion, that since the Plaintiff's lessor had undertaken to procure the Defendant a licence for the waste, and had failed to perform his own agreement, he could not turn him out upon the want of the licence.

Rule discharged.

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HALLIWELL, Clerk, *v.* TRAPPES.

June 8.

The common law mode of tithing hay is in the cocks into which the grass is first collected after cutting and tedding;

Although the parson cannot conveniently make his tithe into hay, while the parishioner is making his nine parts without either mixing the whole again, or committing a trespass by treading on the parishioner's hay.

The common law mode of tithing wheat is in the sheaf.

And not in the shock.

The parishioner must in all cases leave his nine parts in the field a reasonable time for the parson to compare the tithe with them.

Semble that if the parishioner reaps one land, and in coming back along the same land to reap the next, throws out the tithe of the first, and shocks his nine sheaves, he does not give a sufficient time for the parson to compare.

If the parishioner puts up his sheaves into shocks before the parson has had time to compare the tithe sheaf with the other nine, *semble* that the parson has a right to take down the shock to examine the nine sheaves. *Per Chambre* J.

THE Plaintiff declared on the statute of the 2d and 3d *Edw.* 6. as farmer and tenant of all the tithes of corn and hay in the parish of *Nidd*, for not setting out tithes. The first count was for the tithes of 10 acres of wheat, 40 acres of oats, and 10 acres of barley; the second count was for the tithe of 46 acres of hay; the third count for the tithe of certain acres of turnips; and the fourth count, for the tithe of potatoes. Upon the trial of this cause at the *York* Spring assizes, 1809, before *Lawrence* J., the Plaintiff's counsel, in his opening, stated, that in setting out the tithe of corn, the Defendant first reaped or sheared one land, and as the reapers came back again to begin the next, they severed the tenth sheaf, and threw it into the furrow, and put up the other nine into shocks or stooks, without letting the Plaintiff see that it was fairly set out; but he addressed no evidence to the last-mentioned point, nor rested his case on it. The evidence as to the corn was, that in the two preceding years the Plaintiff had set out the tithe in stooks or shocks, consisting of ten sheaves; but this year the defendant set it out in single sheaves, in the manner above-mentioned, having on the same day given previous notice of his intention to set out the tithe. The Plaintiff did not pretend that it was unfairly tithed in fact, but contended that it ought to have been set out in

shocks

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shocks or stooks. The evidence as to the hay was, that on the same day on which it was cut the owner tedded it abroad, and on collecting it together again, into what were in that country called lap-cocks, or foot-cocks, he set out every tenth cock. (It was admitted that the grass in that state was not fit to put into a stack, it was neither hay nor grass; and when the Defendant's hay was again spread out, there was not room for the Plaintiff to spread out his tithe to dry, without treading on the Defendant's hay: as much space, however, was left for spreading out the tithe as the ground that the tithe had grown upon. It was insisted for the Plaintiff, that this mode of tithing could not be legal, because the parson was debarred of the opportunity to spread and make his hay. *Lawrence* J. was of opinion that both the corn and the hay were properly set out; and that it was sufficient to set out the former in sheaf, and not to put ten sheaves together: and the jury found a verdict for the Defendant upon the two first counts, and for the Plaintiff on the other two.

Shepherd Serjt. in *Easter* term moved to set aside the verdict so far as it was found for the Defendant. As to the hay, he surmised that these foot-cocks were not quite so large as the grass cocks, in which, according to some cases, the tithe may legally be set out. [*The Court*, interposing, observed that that point was too well established for argument, and that it was only strange that the case of *Newman* v. *Morgan*, 10 *East*, 5. was ever agitated at all; it was perfectly clear that the tenant must cut and tithe the produce in grass cocks.] As to the corn, in 3 *Anst.* 640. *Tennant* v. *Stubbing*, the parishioner insisted on a *custom* of throwing out the tenth sheaf, (having first given the rector notice of tithing;) but it appeared that the custom was to make up the sheaves into unequal shocks or threaves, and at the time of

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of carrying, to throw out the tenth for the parson, when, if he attended, and rejected the tenth, he might take the eleventh; and *Macdonald* C. B. held, "that the custom "was unreasonable, and therefore void, for it deprived "the tithe owner of an advantage which the law always "gave him, of having his tithe so set out, that he might "compare it with the other parts." He observed that the mode practised in this case equally precluded the parson from seeing that his tithes were fairly set out; for the farmer, by putting his own sheaves into shocks, rendered it less easy for the parson to compare the tithe sheaf with the other nine: the farmer might put three or four very large sheaves in the centre of his shock, and the parson, having no right to take down the shock in order to examine them, could not discover the fraud. In *Tennant* v. *Stubbing*, an hour's previous notice was thought too short for comparing the tithe with the nine parts, and the time allowed here is still shorter; for as soon as the reapers have sheared a land, they throw out the tithe in returning. [*Chambre* J. If the owner shocks his sheaves so soon as to prevent the comparison, the parson must of necessity have the right to pull them down to examine them, which would be attended with monstrous inconvenience.] *Manley* Serjt., *amicus curiæ*, mentioned the case of an action brought by a farmer against the parson for not taking away his tithes, which was tried before *Le Blanc*, J., at *Worcester*, on the common law right, not on any special custom of tithing; and the learned Judge nonsuited the Plaintiff because the tithe was set out in sheaf, and not in shock: and the case was never afterwards moved. [*Mansfield* C. J. observed that cases had often been agitated in the Court of Exchequer upon the question, how much of a field may be cut and taken away at one time without letting the parson see more of it: but certainly one land seemed too little.] The Court granted a rule *nisi* as to the corn, but

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but refused it as to the second count, which respected the hay.

On this day *Lawrence* J., on reporting the evidence, observed that the Plaintiff at the trial rested his case on the ground that the common law mode of setting out the tithe of corn was in shock, not in sheaf, and did not then rely on the point which *Shepherd* had made, that the parson could not compare and judge of the equality of the tithe, nor had addressed any evidence to that point, although it was incidentally mentioned in opening the case. Upon the principal point, that the common law mode of tithing corn is in the sheaf, he referred to the following authorities: *Lamb* v. *Tattersall*, 2 *Wood*, 418. *Bendish* v. *Kemble*, 2 *Wood*, 345.; in both of which cases the Defendant relied on his setting out the tithe of wheat in sheaf; and the Court directed an issue to try whether the custom within the parish was to set out wheat in shock, or in sheaf: but this issue would not have been directed, unless the common law method were to set it out in the sheaf. *Gibson's Codex*, 456. says the common law method is in the sheaf. 1 *Ro. Ab.* 644, *pl.* 5. "The parishioner of common right ought to "make his corn into sheaves," and *pl.* 6. "The pa-"rishioner is not bound to gather or set up his corn in "hillocks, or heaps, but it is a good manner of tithing "to throw the shocks out;" by which word he there evidently means sheaves. Authorities to the same effect are, *Anon. Latch*, 226. *Watson*, 549. *Tennant* v. *Stubbing*, 4 *Gwill*, 1440. *Archbishop of York* v. *Stapleton*, 2 *Atk*. 136. *Erskine* v. *Ruffle and Brewster*, 3 *Gwill*, 966. *Ledgar* v. *Langley*, 1 *Sid*. 285.

The Court were unanimous, that they could not upon the present occasion go into the question, whether the parson had reasonable time to compare his tithe with the nine

nine parts, as the case did not turn upon that point at the trial: but the law on that subject clearly was, that the tithe must be so set out, and the nine parts left so long, that the parson may have an opportunity of judging by the view whether the tithe is fairly set out or not.

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Rule discharged.

Cockell, Serjt. against the rule.

DOE, on the Demise of PETER GREASLY, *v.* NELSON and Another.

June 12.

It is no objection to a recovery with double voucher that the tenant jointly vouches the tenant for life and remainder-man in tail, who vouch over the common vouchee.

JOHN *Greasly*, by his last will, dated the 13th of *Oct.* 1769, devised all his real estates whatsoever unto his wife *Sarah Greasly*, late *Sarah Hawkesley* spinster, for her natural life, and from and immediately after her decease, he devised the same unto and to the use of *Elizabeth Greasly*, then an infant of the age of two months, or thereabouts, his only daughter and child by the said *S. Greasly* his then wife, and of the heirs of her body; and if the said *E. Greasly*, his daughter, should happen to die without issue, then to the use and behoof of the testator's three nephews, *Peter Greasly*, *William Greasly*, and *John Greasly*, and of their several respective heirs and assigns, as tenants in common. *Elizabeth Greasly*, having died in 1792, leaving no issue, and *Sarah* the testator's wife, who after his decease married the Defendant *Nelson*, being since dead, *P. Greasly* the remainder-man brought three several ejectments, to recover the several devised premises, being situated in three counties. The Defendant rested his title on a recovery suffered in *Easter* term, 31 *Geo.* 3., at which time *Elizabeth Greasly* was of age; in which recovery, *T. Goulton* was demandant, and *R. F. Lee* tenant, who vouched to warranty *Geo.*

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DOE, Lessee of GREASLY, v. NELSON and Another.

Geo. Nelson and *Sarah* his wife, and *Elizabeth Greasly* jointly, who appeared, and jointly vouched over the common vouchee. *Bayley* J., before whom one of these causes was tried at the *Nottingham* Spring assizes 1809, was at first disposed to think the recovery defective on account of the joint voucher; but recollecting the case of *Page* v. *Hayward*, 1 *Salk*. 570., he directed a nonsuit, with liberty for the Plaintiff to move to set it aside.

Vaughan Serjt. accordingly, in *Easter* term, obtained a rule *nisi*. He observed that in *Page* v. *Hayward*, the best report of which is found in *Pigot*, 176., where the joint voucher of tenant in tail and remainder-man in tail was held good, it was wholly unnecessary to vouch the latter, because the former was fully competent to take the recovery over in value: and that the learned Judge, upon the trial, was at first of an opinion strongly against it, according to the authority of *Leech* v. *Cole*, *Cro. El.* 670. And *Pigot*, 37. says that no man would have the boldness to suffer a recovery in this manner.

Williams Serjt. shewed cause against this rule. It would shake half the titles in the kingdom to contend that if a person be vouched jointly with 20 others, whether tenants in tail or not, and vouch over the common vouchee, it would not be good.

The Court, stopping him, called on *Vaughan* to support his rule, and he admitted that the cases of *Page* v. *Hayward*, and *Martin dem. Tregonwell* v. *Strahan*, *Willes* 444. where it is held that the bar no longer depends on the recovery over in value, but on a recovery being one of the common assurances of the land, had so shaken the doctrine laid down in *Leech* v. *Cole*, that he could not support his rule, which was accordingly

Discharged.

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AMBROSE *v.* HOPWOOD.

June 14.

If a declaration alleges a bill to be accepted payable at the house of certain persons at a particular place, it must also aver that the bill was presented for payment at that place, and not to those persons generally.

THE declaration averred that the Defendant drew a bill of exchange directed to *T. Charlton*, and thereby required him two months after date to pay to the Defendant's order 100*l.*; which bill the said *Thomas* afterwards, to wit, at, &c. accepted, and by such his acceptance made the said bill payable at certain persons using the stile of Messrs. *Freeman's & Co.* No. 6, *Church-street*, *Bermondsey*, *Southwark*, and that at the expiration of the time appointed for the payment of the money therein mentioned, the bill was in due manner shewn and presented to the said Messrs. *Freeman* and *Co.* for payment, and was dishonoured. The Defendant demurred specially for causes which *Shepherd* Serjt., of counsel for the demurrer, admitted he could not support; but he insisted that there was no due averment of the presenting the bill for payment, and that this objection, which was not one of the causes assigned, went to the substance of the case; for consistently with this averment, the bill might be presented to Messrs. *Freeman*, at the *Royal Exchange*, or at some other place, where the Defendant did not undertake that they should pay it: by the tenor of the acceptance it was to be presented at a particular place only.

Onslow Serjt., *contrà.*

The Court held the objection fatal (*a*), but permitted the Plaintiff to amend on payment of costs.

(*a*) But see *Huffam* v. *Ellis*, *Cor. Dom. Proc.* in Error, *Easter* term 1811, *post.* vol. 3. where the contrary was decided.

ANONYMOUS.

June 14.

The Court will not compel security for costs on the ground that the Plaintiff is a bankrupt; or in *Newgate*.

VAUGHAN Serjt. moved that the Plaintiffs might give security for the costs in this action. One of them was a bankrupt, the other was a prisoner in *Newgate*:

and

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and the affidavit on which he moved, stated the deponent's belief that neither of them was possessed of any property: and the case of *Webb* v. *Ward*, 7. *T. R.* 296. was cited, in which, being an action brought by an uncertificated bankrupt, the Court compelled his assignees to give security for the costs. In the present case, if any thing should be recovered by the Plaintiff, it would equally as in that case become the property of the assignees. The Plaintiffs themselves also sued as the assignees of a bankrupt.

The Court held, that unless some express authority could be found to warrant such an interposition, they could not grant the rule. The presumption of the law was in favour of the innocence of the man in prison, and the Defendant might sue him for the costs. The accident of a person's being in prison did not take away his right to sue, were it for ten thousand pounds.

Rule refused.

June 17.

PHILP *v.* DONATI.

Before an action can be brought on the building act, to recover a proportion of the expences of building a party wall, the accounts prescribed by the 41st section must be delivered, whether the house be occupied by the owner or by a tenant. And a formal demand of the money must be made 21 days before action brought.

THE Plaintiff declared in *assumpsit*, for part of the expence of building a certain party wall before then built at the Plaintiff's expence, according to the directions of the stat. 14 *G.* 3. *c.* 78., between a messuage of the Plaintiff, and an adjoining messuage, and which wall had before then been made use of by the Defendant, who before, and at the time of building and finishing the same, was the owner of, and the person entitled to, the improved rent of such adjoining messuage; and also for a certain part of certain other expences which were necessary for the pulling down of a certain old party wall between the said several buildings, before that time

1 pulled

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pulled down at the expence of the Plaintiff, agreeably to the directions of the same act. The Defendant pleaded the general issue. The question in the cause depended upon the 41st, and two or three preceding sections of the act. The 41st section enacts that the person at whose expence any party wall shall be built, agreeably to the directions of that act, shall be reimbursed by the owner or owners, who shall be entitled to the improved rent of the adjoining building, and who shall at any time make use of such party wall, a part of the expence of building the same, in the proportion therein mentioned, (which varies in respect of the class of buildings to which the house benefited belongs,) to be paid in respect of every such party wall as should be built against or adjoining to any other house, so soon as such party wall should be completely built and finished; and that the owner or occupier of such adjoining house or building should, together with such proportional part of the expence of building such party wall, also pay a like proportional part of all other expences which should be necessary to the pulling down the old party wall; and the whole of all the reasonable expences of shoring up such adjoining house, and of removing any goods, furniture, or other things. And it is thereby directed that the expence of building any such party wall shall be estimated at 7*l*. 15*s*. per rod for the new brickwork, deducting thereout after the rate of 28*s*. per rod for the materials, if any, of so much of the old wall as did belong to such adjoining building; and that within ten days after such party wall shall be built, or so soon after as conveniently might be, such first builder or builders shall leave at such adjoining house a true account in writing of the number of rods in such party wall, for which the owner or owners of such adjoining house shall be liable to pay, and of the deduction which such owner or owners shall be entitled to make thereout on account of such materials, and also on account

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count of such other expences as aforesaid; whereupon it shall be lawful for the tenant or occupier of such adjoining building to pay such proportional part as aforesaid, to such first builder for the same, and also for shoring and supporting such adjoining building, and for all such other expences as are thereinbefore directed to be paid by the owner or owners of such adjoining building, and to deduct the same out of the rent which shall become due from him to such owner or owners under whom he holds the same, until he shall be reimbursed. And in case the same be not paid within 21 days next after demand thereof, then the same shall and may be recovered, with full costs, of and from such owner or owners by action of debt, or on the case. Upon the trial of this cause at the *Westminster* sittings after last *Easter* term, before *Mansfield* C. J., it appeared that the Plaintiff had taken down an old party wall, which stood between his own house and the contiguous house of the Defendant, which was in her own occupation, and had built a new party wall in the room of it, at the expence of *300l.*, forming part of an entire new house, which the Plaintiff had erected there for himself; and no account of the expence of the party wall was delivered to the Defendant until after the whole house was completed. But the Plaintiff proved, that about two months after the party wall was finished, an account was delivered at the Defendant's house, and that the Plaintiff's attorney had several times attended the Defendant with the bills of the expences, and had gone over and examined the several items with her. It was objected, on behalf of the Defendant, that the Plaintiff had failed to prove four essential things. 1. That he had paid the money for the work which had been done. 2. That he had delivered at the adjoining house, within ten days after the wall was built, a true account in writing of the number of rods in the party wall; or, 3. of the deduction which the owner was entitled

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titled to make, in respect of the materials of the old party wall. 4. That no demand had been made of the money due, nor had there consequently been any failure to pay within 21 days after demand, which was necessary to constitute the very foundation of the action. The jury found a verdict for the Plaintiff, for the proportion of the sums claimed, which would be due if the house benefited were of the same class with the Plaintiff's, with leave for the Plaintiff to move to reduce the damages, or to enter a nonsuit.

Accordingly *Best* Serjt., in the last term, obtained a rule *nisi*; and on this day,

Shepherd Serjt., shewed cause. He contended that the regulations of this section requiring an account to be delivered are only directory, and apply only to the case where a tenant, and not the owner, occupies the house benefited by the party wall. These accounts are intended only as warrants to the occupier to authorize his payment of the money for his landlord, and to enable him upon the evidence of these vouchers to recoup himself out of his next rent; but they are not necessary where the house is not occupied by a tenant, who has accounts to pass with his landlord, but by the owner himself, who has no one to account to for his expenditure. The act indeed gives the builder an action against the owner, not requiring that he shall be also the occupier; but it gives the occupier an option to pay the money, and deduct it from the rent due to the landlord; for which there is this very good reason, that it may be very desirable for the occupier to have the party wall rebuilt, but the landlord may not be equally solicitous to incur the expence of it; and it is only for the sake of enabling the tenant to reimburse himself, that these requisites are to be complied with.

 Best,

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Best, *contrà*. In the first place, it is now clear on the evidence that the Defendant's house is of a smaller class than the Plaintiff's, and that she is therefore liable to pay only one fourth, instead of one half of the expence of the wall. (This was admitted on the part of the Plaintiff.) In the next place, no account of the materials of the old wall was delivered, nor was any account of the expences of the party-wall delivered within ten days or a convenient time. Nor was there any demand at all made of the money, unless the mere delivery of some accounts could be deemed to imply a demand. These requisites must be complied with in all cases before any action at all can be brought against the owner of the adjacent house.

Mansfield C. J. The words of the act which give the action are, "And in case the *same* shall not be paid "within 21 days after demand thereof, then the *same* "shall and may be recovered, together with full costs of "suit, of and from each owner or owners." Is not the same still the price to be paid for building the wall, for shoring up the adjoining house, &c. and there is nothing else in the sentence to which the word same can refer. Is not that then the sum to be contained in that account? The act says nothing of the occupier having 21 days to pay it in; it states that 21 days after demand thereof an action may be brought against the owner. The account delivered in this case contained no hint of the value of the old materials, nor was any formal demand made. The statute requires a formal demand of the money before an action can be brought, as much as the common law requires a formal demand upon an entry for a forfeiture.

Rule absolute to enter a nonsuit.

BULLOCK *v.* MORRIS.

June 19.

If a Plaintiff sue out writs into two counties, and arrest the Defendant in both, who gives bail in both, the Defendant does not thereby obtain the right of electing in which county the bail shall stand. But the bail first given continue liable.

THE Plaintiff issued a *capias* into *Somersetshire;* but the defendant not being there found, he issued another original *capias* into *Middlesex*, on which the Defendant was taken in that county, and gave bail. On the 31st of *January* the bail bond was assigned to the Plaintiff, and on the 1st of *February* the Defendant was arrested at *Bath*, on the *capias* first sued out, and gave bail to the sheriff there. The defendant was almost immediately apprised that this was a mistake, and that he need not put in bail to this writ, as no further proceedings would be had on it. *Best* Serjt. had obtained a rule *nisi* to set aside the assignment of the bail-bond by the sheriff of *Middlesex*, for irregularity, on the ground that the party was arrested in *Somerset*, and had given bail there.

Shepherd Serjt. on this day contended, that upon the facts, there was no irregularity in the assignment of the first bail-bond, although the Plaintiff might perhaps be liable to an action for false imprisonment in making the second arrest.

Best, contrà, contended, that the defendant being arrested in two counties, although there was only one affidavit to hold to bail, he could not be held to bail in both counties, and might elect in which of them he would put in bail.

The Court could not discover any ground for setting aside the proceedings on the first bail-bond. The bail in *Middlesex* was not wrongly put in. It would be right that the proceedings in *Somerset* should be set aside, and that the Plaintiff should pay the costs of those proceedings up to the time when he gave notice that he should

 not

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not proceed in *Somerset*. But they let in the Defendant to try the cause in *Middlesex*, the bail-bond in that county standing as a security; and discharged the rule, without costs on either side.

June 19.

WYBORNE *v.* ROSS.

A *cognovit* is not discharged by bankruptcy and certificate.

THE Defendant in this case had given the Plaintiff a *cognovit* for the amount of a banker's check, on which he was sued. About two years afterwards a second commission of bankrupt issued against the Defendant, and he had since obtained his certificate; but no dividend had been declared. The plaintiff having lately entered up judgment, and taken out execution, *Pell* Serjt. moved to set it aside, suggesting that the *cognovit* was discharged by bankruptcy and certificate.

But *The Court* observed, that a *cognovit* is a mere acknowledgment of the amount of the damages; and where a man acknowledges the cause of action, the Plaintiff may sign judgment at any time. This was not like a warrant of attorney.

Rule refused.

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June 20.

The release of an adverse claim to a litigated estate, is a good and valuable consideration in a deed, to avoid a former voluntary grant by virtue of stat. 27 *Eliz. c.* 4.

Although the relessee was not party to the original suit, but came in by consent, and entered into an order of reference.

And although he would not have been bound by the judgment in the original suit.

And in pleading such a release it is not necessary to shew what was the value or nature of the claim released.

A grant of an advowson, except the next presentation, made during a vacancy, is good.

A. seised in fee of an advowson, except the next presentation, which *B.* had under the same title, in consideration of natural love and affection conveyed the advowson in fee to his son: upon a vacancy happening, *C.*, claiming title to the advowson, contested the next presentation against *B.* in a *quare impedit. A.*, *B.*, and *C.* entered into a compromise, upon the terms that *C.* should release his claims to *A.* and *B.* according to their respective interests, and that *A.* should convey to *C.* the then next following presentation, which he did. Held that the grant of that presentation was a conveyance for a valuable consideration, and was paramount to the grant made to the son of *A.*

THIS was a writ of *quare impedit* brought to establish the Plaintiff's right to present to the vacant vicarage of *Fremington*, in the county of *Devon*. The Plaintiff in his declaration deduced his title from *Richard Hawkins* and *Thomazin* his wife, who in 1660, in right of *Thomazin*, were seised in fee of the advowson, and presented to the vicarage, then being vacant, *J. Collibeer* their clerk, (who was thereupon admitted, instituted, and inducted,) through divers descents and mesne conveyances, to *Dorothy Hawkins*, who in 1721 intermarried with *Wm. Littlejohn*. He further stated, that the vicarage becoming vacant in 1725, one *John Hawke* usurping on the right of the said *William* and *Dorothy*, presented one *Charles Hill*, who was admitted, instituted, and inducted: that during his incumbency, in *Michaelmas* term 33 *G.* 2., a fine *sur conusance de droit come ceo*, &c. between *J. Rogers*, Plaintiff, and *Wm.* and *Dorothy Littlejohn*, Deforciants, was levied of the said advowson, to the use of such person or persons as the said *Dorothy* by deed or

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will, executed in the presence of three witnesses, should give, devise, or grant the next presentation to, and after the death of the person who should be thereupon presented, to the use of such person in fee as the said *Dorothy* should by deed or will, similarly attested, give, devise, or grant; and in default of such gift, to the use of *W. Littlejohn* and his heirs. That in pursuance of this power, *Dorothy*, by indenture of 26th *Dec.* 1759, made between herself and *Ann Hill*, and duly executed in presence of three witnesses, granted to *Ann Hill* and her assigns the then next presentation. That *Dorothy* died in 1761, without having made any further disposition of the advowson; whereupon *W. Littlejohn* became sole seised in fee, subject to the grant to *Ann Hill*, and by indenture of the 24th of *October* 1765, gave, granted, bargained, and sold the same advowson to *Charles Hill*, the *father* of the Plaintiff, in fee. That on the 1st of *June*, 1773, the vicarage became vacant by the death of *Charles Hill* the *incumbent*, which was the next vacancy thereof after the grant to *Ann Hill*. And the same vicarage being so vacant, and *Charles* the *father* being seised in fee of the advowson, except the vacancy, by indenture of 1st *Dec.* 1773, made between *Charles Hill* the *father* and *Charles Hill* the *Plaintiff*, *C. H.* the *father* granted, bargained, and sold the same advowson unto and to the use of *C. H.* the *Plaintiff*, and his heirs. That afterwards, on the 15th of *Dec.* 1773, one *Samuel Cooke*, clerk, by virtue of the grant to *Ann Hill*, was presented to the vicarage; and the said *Charles Hill* the *Plaintiff*, being so seised, the vicarage on 1st *June* 1807 became vacant by the death of *Samuel Cooke*, and was still vacant, and it belonged to the said *Charles* the *Plaintiff* to present thereto, and the Defendants hindered him thereof. Wherefore, &c.

To this declaration, the bishop pleaded a disclaimer, except as ordinary. The Defendant, *Edward Thompson*

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May, craved oyer of the indenture of 1st *Dec.* 1773. Upon oyer, it appeared to be made between *Charles Hill*, of *Tavistock*, clerk, of the one part, and *Charles Hill* his son of the other part. And after therein reciting that the said *Charles Hill* claimed to be seised in fee of the advowson of the vicarage of the parish church of *Fremington*, except the present vacancy on the death of *Charles Hill* (the *incumbent*,) which was to be filled up by a proper clerk to be presented by some other person, as by the conveyances might appear, it was witnessed that *Charles Hill*, in consideration of five shillings, and for divers other good causes and considerations, and in consideration of natural love and affection towards *C. H.* the son, and for his advancement in the world, did grant, bargain, and sell the same advowson unto and unto the use of the said *Charles Hill* the *son*, his heirs and assigns. The grantor then covenanted against incumbrances by *himself*, and for quiet enjoyment against *himself*, (the right of presentation which was then vacant, and which was theretofore granted to *Ann Hill* by *Wm. Littlejohn* and *Dorothy* his wife, and then vested in *Robert Cooke*, Esq. excepted.) The Defendant *May* then pleaded that *C. Hill* the *incumbent* died in *June* 1773; and that the said indenture was made and executed after the vicarage became void by his death, and while the same remained void(*a*), and before the admission, institution, and induction of the said *Samuel Cooke* thereto, and while the suit thereinafter mentioned was pending; and that *Charles Hill* the Plaintiff, at the time of the execution of the indenture, was an infant of the age of 16 years, and that the said

(*a*) There was no discussion on this part of the plea on the question whether the vacancy of a living vitiates a grant of the advowson exclusive of the then vacant turn. Authorities are, *Bishop of Lincoln* v. *Wolferstan*, 3 *Burr*. 1511. in which is an erroneous statement, corrected in 2 *Bl.* 1055. *Barret* v. *Glubb*. *Walker* v. *Hammersly*, 3 *Lev.* 116. *Skinner*, 90.

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said indenture was made on no other consideration than that which was therein expressed: and further, that on the death of *Charles Hill* the *incumbent*, *Robert Cook* presented *Samuel Cook*, clerk, his brother, as a fit person to serve or fill the said church, and there being several *caveats* entered by the said *Robert Cook*, *William Creed*, Gent. and *Samuel May*, father of the said *Edward Thompson May*, *Elizabeth Penrose*, and others, the then Lord Bishop of *Exeter* declined to admit, institute, or induct any clerk, until the right of the said vicarage should be legally determined; whereupon the said *Robert Cook* sued out his writ of *quare impedit* against the Lord Bishop of *Exeter*, *William Creed*, *Samuel May*, and *Elizabeth Penrose*, and declared thereon; and the Bishop pleaded that he claimed nothing in the advowson but as ordinary, and *Creed* pleaded his title, and *Samuel May*, *claiming title to the advowson, pleaded the same*, and *Robert Cook* replied to the pleas of all the Defendants, and the said *Samuel May* rejoined thereto, and the said *Elizabeth* suffered judgment to go against her; and thereupon several issues were joined, as between *Robert Cook* and the Bishop, and *Creed* and *Samuel May*; and the cause came on to be tried at the Summer assizes, held on the 8th day of *August* 1775, at the castle of *Exeter*, when by the consent of the said parties, *and of the said* Charles Hill *the father*, *present then in court and consenting to the proceedings thereinafter stated*, a verdict was found for *Robert Cook* the Plaintiff, against the said Defendants, subject to an order of *Nisi Prius*, or assize, then and there made in the said cause, whereby it was ordered by the Court there, by and with the consent of the several parties thereto, their counsel and attornies, that the Defendant *Samuel May* should release to *Robert Cook* his right and title to the next presentation, and to the same *Charles Hill the father* the right to the advowson; and the said *Charles Hill* being then present in court, and consenting thereto, and

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and undertaking for themselves and their representatives to present the said *Samuel May* or his assigns to the said vicarage, on the avoidance next after the then present one; and the said *Robert Cook* paying *Samuel May* 75*l.* in part of his costs for relinquishing his claim to the said then present turn and avoidance, in case the said *Robert Cook* the Plaintiff should recover the presentation to the then avoidance; but if he should not, the Defendant *Samuel May* was to be at liberty to litigate the title to the advowson with any other claimant or claimants; and it was further ordered, that the said order should be made a rule of court; which order of *Nisi Prius* afterwards, in *Hilary* term 1776, was in due manner made a rule of court: and the said *E. T. May* further averred, that judgment was entered up and signed on the said verdict, and a writ issued thereon out of the Court of Common Pleas, directed to the Bishop of *Exeter*, commanding him, that notwithstanding his disclaimer, and the several claims of the Defendant's *Creed*, *Samuel May*, and *Elizabeth Penrose*, he should admit a fit person to the vicarage, at the presentation of *Robert Cook*; and *Samuel Cook*, on the presentation of *Robert Cook*, was afterwards in pursuance of the said verdict and judgment, and writ thereon since issued, lawfully instituted and inducted accordingly into the said vicarage, &c.; and further that the said *Samuel May*, in pursuance of and in obedience to the said order of *Nisi Prius*, and rule, afterwards, and after the said church was so full of the said *Samuel Cook* by deed of the 2d of *October* 1778, but which being in the possession of *Charles Hill the Plaintiff*, the said *E. T. May* could not bring into court, gave, granted and released all his right and title to the advowson of the vicarage and parish church of *Fremington* aforesaid, and all right and title whatsoever to the presentation to the vicarage of the said church, to the said *Charles Hill*, the father of *Charles Hill* the Plaintiff, and

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and his heirs; and thereupon afterwards, and while the said *Charles Hill* the father was so seised of the said advowson as aforesaid, to wit, on the day and year last aforesaid, *Charles Hill the father*, and *Robert Cook*, for and in consideration of the premises, and of the said consent, verdict, order, rule, and release, by indenture between the said *Charles Hill the father* and *Robert Cook*, of the one part, and *Samuel May* of the other part, reciting the above-mentioned avoidance, suit, trial, verdict, order, judgment, rule, and release, in pursuance of and in obedience to the said order of *Nisi Prius*, and rule of Court, and in consideration of 5s. to each of them, and for divers good causes and considerations them the said *Charles Hill* and *Robert Cook* thereunto moving, did, as far as they lawfully could or might do, give, grant, bargain, sell, transfer, and set over unto the said *Samuel May*, his executors, administrators, and assigns, the first and next presentation and free disposition of the said vicarage; and the said *Charles Hill* and *Robert Cook* did thereby covenant, that it should be lawful for the said *Samuel May*, his executors, administrators, and assigns, whensoever and howsoever, either by death, resignation, privation, or cession of the said *Samuel Cook* so presented, and then instituted and inducted into the same church, or by any ways or means whatsoever the aforesaid church of *Fremington* should first or next happen to be void, to present any fit person thereunto; and to do all other acts and things belonging to the office of patron, for the better fulfilling, accomplishing, and establishing such next vacation or avoidance only, as fully and effectually as the said *Charles Hill* and *Robert Cook*, or either of them, in that behalf might or could do, notwithstanding the said indenture: there were also covenants in the usual form, for further assurance, against incumbrances by them the said *Charles Hill* and *Robert Cook*, or any persons claiming under them, and for quiet enjoyment in

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as full and ample a manner as they the said *Charles Hill* and *Robert Cook*, or either of them, their or either of their respective executors, administrators, or assigns, might have enjoyed the same if the said indenture had not been made, without the lawful let, &c. of the said *Charles Hill* and *Robert Cook*, or any claiming under them; and a covenant by *Charles Hill* for the production of title deeds. The Defendant, *May*, then averred, that *Samuel May* being by virtue of this deed possessed of the next presentation to the vicarage, afterwards, on the 5th of *October*, 1801, made his will in writing, and thereby gave and bequeathed to *E. T. May* all his right, title, and interest in and to the same advowson, and having made *Samuel Thompson May* his executor, on the 1st of *January*, 1803, died, without altering or revoking his will, whereupon the said *Samuel Thompson May* duly proved the same, and assented to the said legacy; and that *E. T. May* having thereupon become possessed thereof, the said vicarage on the 1st of *June* 1807, became and yet was vacant by the death of *Samuel Cook*, which was the first and next avoidance after the said grant to the said *Samuel May*; whereby it belonged to the said *E. T. May* to present. The Defendant, *E. T. May*, secondly pleaded the same introductory facts as before, and that the indenture of 1st *December*, 1773, was made on no other consideration than that which is therein expressed, and on no valuable consideration whatsoever; and that the same was *fraudulently made by the said* Charles Hill *the father, with intent to deceive and defraud the said* Samuel May. The plea then went on to state the proceedings on the first *quare impedit* and the trial; and that by consent of the parties, and of the said *Charles Hill the father*, present there in court, and consenting to the proceedings thereinafter stated, *the said* Charles Hill *the father then and there pretending and claiming to be interested in the advowson of the said vicarage, and neither producing, or giving notice*

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notice of the said indenture of the 1st *day of* December, 1773, a verdict was found for the said *Robert Cook*, &c.; the plea then proceeded to state the other circumstances as in the former plea.

The Plaintiff to the first plea of the Defendant *May* replied, that *Samuel May* had not any right, title, or interest whatsoever of, in, or to the said advowson of the right of the then presentation, or of, in, or to the advowson of the vicarage or parish church of *Fremington* aforesaid, or to the vicarage of the said parish church, at the time when the said suit in the said first plea mentioned was commenced and was depending, or at the time of the making of the order of *Nisi-Prius*, or at the time of making the same a rule of Court, or at the time when the judgment was entered up, or writ issued, or at the time when *Samuel Cook* was instituted and inducted, or at the time of making of the said deed of the 2d *October*, 1778: and to the last plea of the Defendant *May*, he replied in the same terms, and concluded by traversing that the said deed of 1st *December*, 1773, *was fraudulently made by the said* Charles Hill *the father with an intent to deceive and defraud the said* Samuel May. The Defendant *May*, after several imparlances, demurred generally to the first replication, and rejoined to the last replication by tendering an issue on the traverse of the fraud. The Plaintiff joined in demurrer and issue. The plea of the Defendant *Langdon* was not material to the present case.

Lens Serjt. in support of the demurrer. The indenture of *December*, 1773, to *C. Hill*, is a fraudulent conveyance under the stat. 27 *Eliz. c.* 4. and void against a subsequent purchaser for a good consideration. *Doe ex dem. Bothell* v. *Martyr*, 1 *New Rep.* 332. That natural love and affection is not a valuable consideration will hardly

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hardly be disputed, after the case of *Doe dem. Otley* v. *Manning*, 9 *East* 59. (to which the Court agreed); and the only question therefore is, whether the grant of the presentation to *S. May*, of the 2d *October* 1778, was a conveyance for a good and valuable consideration. It is not necessary, in order to make a good conveyance under the stat. of 27 *Eliz.* that the consideration should consist of money: any other good and valuable consideration is of equal effect; and it is unnecessary to cite cases, to shew that the releasing of an adverse title is a good consideration. At the time of the compromise, *Cooke* and *Hill* had between them, as the plaintiff contends, the whole advowson; *Cooke* having the then vacant presentation, and *Hill* the residue of the advowson; *May* interposed his claim, and upon this claim a *quare impedit* came on to be tried, and while the matter was yet to be tried by evidence, that evidence being not yet disclosed, the parties enter into a compromise; the whole argument against the value of this consideration is, the plaintiff's assumption, that if the trial had proceeded, the then Plaintiff would have shewn in evidence that the then Defendant *May* had no title at all, and that, though he gave up all his claim, yet, as he had nothing, therefore he gave nothing; this is an attempt to rip up the whole matter, and to put it on the same footing on which it stood on that day; but the answer to it is, the Defendant gave the release as a price, and the Plaintiff was content to receive it as a price: the one party was then content to take the remainder of the advowson only, and the other was content to give it. That was therefore by his own admission a valuable consideration, and must prevail against the prior grant in consideration of natural love and affection only.

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Shepherd Serjt *contrà*. The first question is, whether the plaintiff is estopped by the deed of 1778 from contesting the defendant's title: and he clearly is not. If a grantor, indeed, should recite in a second voluntary conveyance, that the grant was made in consideration of a sum of money, he would be estopped by his deed from disputing that fact; but it would still be open to the grantee in the first conveyance to traverse the payment and to shew that the second deed was fraudulent. It makes a wide difference whether one claims under another by a title prior or title subsequent to the matter which is to impeach his rights. And the plaintiff, who claims by a prior title, is not estopped by any subsequent act of the father, although the father himself would be estopped. Admitting the authority of *Otley* v. *Manning*, the next question here is, whether a voluntary conveyance be avoided by a subsequent voluntary conveyance; for it does not appear that the deed of 1778 was given for any valuable consideration. It is not sufficient merely to state in a plea that a deed is made upon good consideration; the consideration must be set forth in the plea, that the Court may judge of its value. If the deed had been stated to be made in consideration of a sum of money, the Court would have seen at once that the consideration was good: it must also be averred, indeed, that the money was actually paid. If a deed were made in consideration of marriage, that would suffice; but the marriage must be specially averred in pleading, to give the opposite party an opportunity to traverse it. This plea merely amounts to saying, that on the former occasion the defendant said he had a title, and released that which he said he had. The consideration was the defendant's title against the plaintiffs: in order to try the value of it, it is necessary to ask what was his claim, that it may be seen whether it was something substantial, or at least apparently

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apparently so. If he had set out on the face of his plea, a title which was clearly bad, which could be dubious to no one for a moment, the Court would not say that a release of that title would be a good consideration. And since no title is stated, none can be presumed. Consistently with the whole of this plea, *May* might have had no grounds whatever for his pretensions. However good the plaintiff's title may be, he could disprove none of the facts here stated. The plea barely amounts to pleading that in 1778 *Hill* conveyed for good consideration; which clearly would be insufficient. If such a plea will avail, a second voluntary conveyance with a little contrivance may always be made to avoid a former one: it is only necessary to feign an adverse title, and to release it, without stating what it is. In this compromise there was no good consideration whatever moving towards *Charles Hill* the father, for he was no party to the record in that suit, nor could his estate be at all affected by the event of it. The matter in dispute was the right to the then vacant presentation, which clearly did not belong to *Charles Hill*, on account of the prior grant of it to *Cooke*. If *May*, upon establishing an apparent title to the advowson, had obtained judgment in that cause, it could not have operated against the rights of *Charles Hill*, who was no party to the action. At that time *Hill* the father had no such interest in the advowson as would enable him to take a release. Until the father should have previously defeated the first conveyance, the whole estate was in the son, and the mere release of *May* to the father could therefore operate nothing, because the father had no estate in him, consequently it was no consideration. *Litt. s.* 447. "Also in releases of the right "which a man hath in certain lands, &c., it behoveth "him to whom the release is made in any case, that he "hath the freehold in the lands, in deed, or in law, at "the time of the release made." *Co. Litt.* 266. *a.* "He "to

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"to whom a release of a right is made must have the "freehold." Whatever interest, therefore, passed from *Samuel May* under that compromise, enured for the benefit of *Cooke* only, and not for the benefit of *Hill*. And supposing for a moment that the release of the next presentation to *Cooke*, was a good consideration as between *May* and *Cooke*, yet the advowson not being in *Hill* the father at the time of the release to him, there was no good consideration moving towards him. But the consideration must also be adequate, as well as valuable. *Upton* v. *Bassett*, *Cro. El.* 445. *Anderson* J. says, "It is clear a fraudulent conveyance is not made void against all, by that statute, but only against those who afterwards come to the land upon good consideration; for so are the words, and so was the intent of the statute: and therefore if a man who hath not good government of himself, makes a conveyance, by advice of his friends, of his lands upon trust, and without any consideration; and afterwards one procures him, for five hundred pounds, or other petty consideration, to sell unto him land worth five hundred pounds per annum; although this last purchaser pays money, yet he shall not avoid the first conveyance; for the statute was made to help those who came to land upon good consideration lawfully, and not without consideration, or by any indirect means: and this case hath been resolved." *Doe dem. Watson* v. *Routledge*, *Cowp.* 712. was decided on the same ground. [*The Court* observed that they had no means to judge of the adequacy of the consideration in this case, and the proposition must be confined to such cases where the consideration was so small as to be palpably fraudulent. Such a deed, it was true, would not avoid a prior voluntary conveyance.] It is manifest upon the face of this plea, that the consideration was so small as to be palpably fraudulent.

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Lens in reply. There is great reason to impute fraud to the plaintiff, who having been conusant of his father's buying off this claim upon the estate which he himself derived from a voluntary conveyance, and knowing that the father treated the defendant's title as real, and bought it as such, is now desirous to dispute the consideration he was to pay for it. The defendant's whole argument rests on the supposition, that the father colluded with a stranger to defraud the son by the second conveyance, which is inconsistent with all probability. It is very apparent what inducement the father had to join in the compromise between *Cooke* and *May*: he then had in himself and his son the whole advowson, except the presentation granted to *Cooke*, and wished to quiet the title: he therefore came in, not upon a device to defeat the right of his son, but to confirm it, the interest of the father and son then being one; and it is too late now to say that the son is not estopped as well as the father. The plaintiff has not pleaded that the second conveyance is fraudulent, which he might have done if it were so. The argument drawn from *Littleton* to shew that a release could not operate, begs the question, for if the second was a conveyance for valuable consideration, the father still retained such an interest that the release would operate: but that argument is of no avail for another reason, namely, that the deed contains the words give and grant, which will pass the estate, if the word release will not. In the case of *Roe* v. *Mitton*, 2 *Wils.* 356. where a widow having a rent charge issuing out of the whole of an estate, parted with her security on the whole, and took a security on a part for the same sum, in consideration of having a remainder over limited to her younger children, it was held to be a conveyance for a valuable consideration. That case coincides with this in two points; first, that it was a relinquishing of the whole in consideration of a part; and, secondly, it proves that

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that there may be other valuable considerations besides money.

Cur. adv. vult.

MANSFIELD C. J. now delivered the opinion of the Court. This is a writ of *quare impedit* against the Bishop of *Exeter*, and *Edward Thompson May* and *Richard Langdon*, who have obtained from the bishop the institution of *Langdon*, upon the presentation of *May*, to the living of *Fremington*. The title of *Charles Hill*, the Plaintiff in this action, depends on a deed executed to him by his father, and set out in the declaration. I take no notice of what is pleaded by other persons, only what is pleaded by *May*. His Lordship then recapitulated the substance of the first plea, and observed that the next plea stated the same things, and further alleged fraud in fact, on which issue was joined. The replication to the first plea is, that *Samuel May* had no interest in the premises: to this there is a demurrer, and two or three questions are made. The great objection and ground of demurrer to the replication is, that it is just the same thing whether *S. May* had or had not any actual title; for he gave up whatsoever he had, and therefore it is quite immaterial what he had. The ground on which the Defendant proceeds is, that the deed of 1773 was a voluntary deed without any consideration but love and natural affection, and therefore void against a purchaser for a valuable consideration by the stat. of *Eliz.* That *S. May* is a purchaser from *C. Hill*; and therefore, being a purchaser, the voluntary conveyance previously made from father to son, became void against him. Now on the general doctrine that voluntary deeds, however reasonable, are void against a subsequent deed in consideration of money, there can be no doubt; for very strong cases have decided, that if a man after marriage make the most prudent settlement on his wife and children, such a deed as every wise man must approve, if

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if the father is dishonest enough to sell it for money afterwards, he may. The question therefore is, whether this is a release made for a valuable consideration. There can be no doubt in general, that the giving up a right, without fraud, is a valuable consideration; the relessor parts with that, for which the other party may very reasonably give money; but it is suggested on the other side, that this might be done fraudulently on the part of the father to cheat the son. It might be sufficient to say we do not presume fraud; but that if there be fraud, it should be the subject of a plea; but it is exceedingly difficult to discover how fraud could be committed here. The father might have sold the advowson for a sum of money at once; and no doubt, if his object was to defeat the estate, which he had before given to his son, unquestionably he would thereby have acquired what he wanted: but it is not likely that he wished to give to *May*, rather than to his son, the next presentation after that to which *Cooke* was entitled. One cannot see what advantage he could get by this transaction, for he got no money; we must therefore conclude that the release was intended for security to his son's title, and that he thought it beneficial to his son's title to make this bargain. And in this view of the case, the son will have the benefit of this release in his future right to the advowson. The Plaintiff might have replied fraud in the father, if he would, and might have gone to issue on it; but he has not. We are therefore of opinion that the Defendant is entitled to the judgment of the Court.

Judgment for the Defendant.

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June 20. **Ludlow and Wife, Conusors. Drummond and Others, Conusees.**

A fine *sur concessit* may be levied where the intention is to pass several mesne particular estates, and a reversion in fee.

SELLON Serjt. on a former day had moved that a fine *sur concessit* might pass, which the parties had covenanted to levy, but which the cyrographer had refused to allow, under the idea that this species of fine was not the proper fine to pass an estate in fee. *Sellon* contended, that it was at the peril of the party what might be the operation of the fine levied, and that the rare occurrence of a particular fine did not render it proper that the officer of the court should prejudge the question, and refuse to let it pass. The premises intended to be conveyed had been devised by a will which first gave an estate for life, with several intermediate estates of inheritance, with the ultimate remainder over in fee; but some of the limitations were so framed, that it was very doubtful whether they gave merely an estate for life or any greater estate, and the parties had been advised to levy this species of fine, because a fine *sur conusance de droit* might possibly work a forfeiture of some of the estates intended to be conveyed, and so defeat their intention; whereas a fine *sur concessit* would equally pass an estate for years, for life, in tail, or in fee, as Mr. *Cruise* observes, *On Fines*, 65.: but 2 *Bl. Com.*, to which he refers as his authority, does not enumerate the two latter estates. Or such a fine may be levied, as Mr. *Preston* remarks in his work on conveyancing, 212, by the words, "all and what-"soever other estate the party hath in the premises." The effect of such a fine was much considered in the case of *Piggot on the demise of Lee* v. *the Earl of Salisbury*, 2 *Mod.* 109. *T. Jon.* 68. 2 *Lev.* 154. 3 *Keb.* 321, &c. And though the Court came there to no decision upon the point, it seems to have been considered that such a fine

was

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was good. In the case of *Lethieullier* v. *Tracy*, 3 *Atk.* 728. 730. Lord *Hardwicke* Chancellor, held that a fine *sur concessit* might well pass a reversion in fee.

Cur. adv. vult.

On this day MANSFIELD C. J. observed, that *West's Symboleography*, which had always been esteemed a book of authority, *part* 2. *s.* 127., contains a precedent of such a fine in the words, *quod prædict. H. & M. concesserunt et reddiderunt tenementa prædicta cum pertinentiis præfato T. et heredibus suis, durante vitâ ipsius M.* with warranty of the same estate. In *s.* 63. a like fine is levied, with a grant of two terms of years, if a life so long last, remainder for life, with the reversion over in fee.

HEATH J. observed, that anciently the courts would not permit such a fine, but that in the cases cited on the motion, it was taken for granted in argument that such a fine might be levied.

Rule absolute (*a*).

(*a*) But see *Seymour* v. *Barker*, *post. Mich.* term, 1809.

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June 20.

If it can be discerned on the face of the sentence of a foreign Court of prize, that the Court condemned on the ground that the property was enemy's property, the sentence is conclusive evidence in the courts here that the property was not neutral;

Although it appears on the face of the sentence that the prize Court attained that conclusion through the medium of rules of evidence and rules of presumption established only by the particular ordinances of their own country, and not admissible on general principles.

THIS was a writ of error brought to reverse a judgment of the Court of King's Bench. The Plaintiff below declared upon a policy of insurance, effected by the Plaintiff, as agent, upon the ship *Oxholme* and her

cargo,

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cargo, both *warranted Danish*, at and from the island of *St. Thomas* to the coast of *Africa*, during her stay and trade there, and at and from thence to *Surinam*, with leave to call at *Bermuda* on her outward passage, and to exchange goods and slaves with any vessels. The declaration averred that *James Hazzell*, *James Murphy*, and *R. D. Jennings* were interested in the ship and cargo to the whole amount insured; that they were at the time of the insurance, loss, and action brought, *Danish* subjects, and that the ship and cargo were *Danish*; the loss averred was a capture by persons unknown. Upon the trial of this cause at *Guildhall*, a special verdict was found, which in substance stated,

That the Plaintiff, as the agent of *Hazzell*, *Murphy*, and *Jennings*, and on their account, effected the policy in question, which was subscribed by the Defendant, upon the ship *Oxholme* and goods. That the cargo was loaded on board the ship at the island of *St. Thomas* for the voyage insured; and that the ship *Oxholme* was at the time of lading of the goods on board, and of the making of the policy, and until, and at the time of the capture and loss, *a Danish ship, and the property of* Hazzell, Murphy, *and* Jennings, and that the cargo was also *Danish* property, being the property of *Hazzell* and Co.; that *Hazzell*, *Murphy*, and *Jennings* were, during all the time aforesaid, *subjects of the King of Denmark*, residing and *domiciliated at the* Danish *island of St.* Thomas, and *interested in the ship and cargo* to the amount insured. That the ship at the time of her sailing, and during her whole voyage, until, and at the time *of the capture, had on board*, to shew that she was a *Danish* ship, the papers following, viz. a *Latin* pass, a *Mediterranean* pass, a bill of sale, a muster roll, a measure brief, a certificate of property, and *every other document usually carried by* Danish *ships*. That the first and second mate, and other officers, and the crew of the ship

ship at the time of the voyage, were *Danes* and *Swedes*, except one man, who was an *American*; and that not one man on board at the time of the capture was a subject of any nation in a state of hostility to *France*. That at the time of making the policy, and from thence, until and at the time of the capture, there was open war between *Great Britain* and *France*. That the ship with her cargo on board sailed from *St. Thomas*, and in the course of the voyage insured, was captured by two *French* frigates, and carried into the *French* island of *Senegal*, where proceedings were instituted before the tribunal for determining questions of prize; and that Court, upon the grounds stated in the following sentence, condemned the ship and cargo as *good and lawful prize*, and ordered them to be sold; and that they thereby became wholly lost to the assured. The sentence of condemnation was as follows: "Liberty, Equality. I, *Emilie Blanchot*, commandant and administrator of *Senegal*, *Goree*, and their dependencies, assisted by Citizen *Sebastian Malvoire*, chief of the civil courts of the marine in this island, *P. A. Marca*, and *Paul Benis*, merchants, of *Awar*, and *Joseph François Charboniere*, registrar of this colony, having seen the verbal process of the capture of the ship *Oxholme*, carrying *Danish* colours, Captain *J. Fowle*, seized the 30th of *Germinal* last by the frigate of the Republic *Regenerée*, commanded by Citizen *Willimets*, *capitaine de vaisseau*; having examined and compared all the instruments and papers relating to the said ship *Oxholme*, particularly two muster rolls, one in the *Danish* language, dated 15th *November* 1797, and the other in the *English* language, dated 17th *November* 1797, and a bill of sale of the aforesaid ship, dated 24th *May* 1796, signed, *J. H. J. Plewsher*; considering that the vessel, of what built unknown, was sold to a subject of a neutral power only since the declaration of the present

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sent war, and that the bill of sale makes no mention either of her place of built, or of her original owner: that the mate, and the third officer, were naturalized *Danes* only since the declaration of the present war; and that the greatest part of the white men of the crew were subjects of hostile powers; I decree the said vessel, the *Oxholme*, to be *good and lawful prize, conformably to the* 10*th*, 11*th, and* 12*th articles of the regulations concerning prizes, of the* 21*st* October 1744, which are thus worded; 'Every vessel of enemy's built, or which shall have been owned by an enemy, shall not be deemed to be neutral, or belonging to an ally, if there be not found on board some authentic instruments, certified by public officers, who may ascertain the date of them; which prove that the sale or transfer thereof was made to some one of the subjects of allied or neutral powers before the declaration of the war,' &c. 'No respect shall be paid to passports granted by neutral or allied powers, either to the owners or masters of vessels who are subjects of hostile states, if they were not naturalized before the declaration of the present war.' 'All foreign vessels shall be lawful prizes, on board of which there shall be a supercargo, merchant, clerk, or marine officer of any of his majesty's enemies, or of which the crew shall consist of more than in the proportion of one third of seamen who are subjects of hostile states.' Accordingly, I decree the said vessel, the *Oxholme*, to be sold in the usual form, and the proceeds to be delivered to whom of right they belong. Done at the government house of the *French* island of *Senegal*. Signed, *Paul Benis, Marca, Malvoire, Blanchot. Charboniere*, Registrar." But whether, &c. The Court of King's Bench gave judgment for the Defendant.

This case was argued in the Exchequer-chamber in *Trinity* term 1808, by *Jennings* for the Plaintiff in error, and *Scarlett* for the Defendant.

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Jennings for the Plaintiff. The principle was laid down by Lord *Mansfield*, in the case of *Bernardi* v. *Motteux*, 2 *Doug*. 574., that no sentence of a foreign court, on the face of which it did not expressly appear, that the condemnation proceeded on the ground of the prize being *enemy's property*, was conclusive to disaffirm the warranted neutrality. The clearest inference of enemy's property, if the fact is to be gathered from the sentence by inference only, will not suffice. The cases of *Pollard* v. *Bell*, 8 *T. R.* 434. *Price* v. *Bell*, 1 *East* 663. *Mayne* v. *Walter*, 2 *Park*. 6 ed. 474., are all consonant to this principle; and if it had been still adhered to, much injustice would have been avoided. The first case which departed from it was that of *De Souza* v. *Ewer*, decided at *Nisi Prius* by Lord *Kenyon*, C. J. at the *Guildhall* sittings after *Hilary* term, 1789, reported in *Park*, 4th ed. 361.; but his Lordship in a subsequent case of *Helstrom* v. *Rhodes*, 8 *T. R.* 444. *n.* desired that it might no longer be considered as of any authority, and it is therefore unfit that a decision which has thus been reconsidered and annulled by the same judge who pronounced it, should again be set up. It does not appear on the face of the sentence, that the neutrality of the *Oxholme* was in question before the court of *Senegal*. The sentence itself expressly declares that she is a neutral, but imputes that she became such after the commencement of the war. The Court must therefore necessarily have condemned her as a neutral; the sentence, it is true, sets outs a number of *French* ordinances, which have not been complied with, but it does not state the failure to observe them as an indication of fraud, and of enemy's property, but as the substantive ground of condemnation. The ordinances require that upon the purchase of a ship by one neutral of another, certain things shall be performed, which may often be impossible; but those being merely *French* ordinances, and not founded on the law of nations

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nations, are not obligatory on the *Danes*. The sentence evidently proceeds on the absence of a single document. The words good and lawful prize occur in all sentences; and although they are found in this, the whole sentence appears to proceed on a ground which fortifies the warranty of neutrality. The sentence states that the mate and third officer are *Danes* naturalized since the war began; that the greater part of the white men of the crew are subjects of hostile powers. The court below relied on these circumstances, and supposed that the *French* court decided on them as *indicia* of enemy's property; but they are such as could not legitimately warrant the *French* court in coming to this conclusion. Lord *Kenyon* C. J. thought that the *French* had no right to make ordinances to bind other nations. In the case of *Pollard* v. *Bell*, the *French* sentence proceeded on the ground that "the captain's quality of enemy "served to legitimate the prize;" yet the Court held that the warranty of neutrality was not broken: And in *Bird* v. *Appleton*, 8 *T. R.* 566., Lord *Kenyon* said, that the case of *Pollard* v. *Bell* was decided after great consideration. The judgment of the court below will amount to a decision, that all sentences of condemnation whatever disaffirm the warranted neutrality. The case of *Lothian* v. *Henderson*, 3 *Bos. & Pull.* 505. does not affect this case; for the sentence there expressly finds that the ship was not neutral property, but "was to be deemed "the property of the enemies of the Republic." In the case of *Kindersley* v. *Chase*, 2 *Park*, 6 ed. 486. it clearly appears on the face of the sentence, that the ship was condemned on the ground of its being enemy's property. In the present case no such grounds appear on the sentence. But even if the sentence did condemn it as enemy's property, it is not conclusive against the Plaintiff in the present action. In the *Duchess of Kingston's case*, 11 *St. Tr.* 198. a distinction was taken as to the effect

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of sentences *in rem*: that they conclude the property of the thing against which the process is, but that they are no further admissible in other courts having equal cognizance of the cause, as evidence of personal rights, than so far as their justice is apparent; and that as to all personal rights, the party affected is at liberty to impeach the sentence. [*Mansfield* C. J. observed, that this argument would go to impeach by collateral evidence every sentence that could be pronounced, and the authority cited either could not be law, or was misunderstood.] A condemnation, in order to bind the property, must be the act of a court of competent jurisdiction. But it appears on the face of this sentence, that it is not the act of a competent court of prize. In the case of the ship *Flad Oyen*, 1 *Robins.* 135. Sir *W. Scott* determined, that a court of prize must be constituted not only in conformity to the general speculative principles of the law of nations, but to the usage and practice of nations. But this court has none of the characters of a legal court of prize.

Scarlett, contrà. The special verdict expressly states, that the proceedings were instituted before the tribunal for determining questions of prize; and the names and titles of the persons adjudging do not militate with this; nor is it to be therefore inferred that these persons are not commissioners of prize, because they call themselves by other descriptions; if, however, there had been any doubt on this point, it was a question to be submitted the jury. It is unnecessary to go through the cases that have been cited; for none of them, not even *Bernardi* v. *Motteux*, is applicable. It may be admitted that if the sentence does not proceed on the ground of the ship being enemy's property, it is not conclusive against the neutrality. The whole question therefore turns on the construction of the sentence: the circumstances of suspicion

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cion which are stated, that the ship is of built unknown, that it has been sold to the neutral since the commencement of the war, which is not only a violation of the *French* ordinances, but in some cases would be deemed to violate the law of nations according to our own interpretation of it, all are pregnant with fraud. The 10th ordinance is a rule of evidence by which the *French* court was bound; and although it might not be the rule of evidence in our courts here, we are not the less bound by the *French* sentence. Several acts of parliament prescribe particular modes of evidence in this country: the mutiny act makes the copy of a soldier's examination evidence of his settlement, of which the examination itself is not evidence. Suppose a cause to be tried in *Scotland* depending on this question; it is impossible to contend that a *Scotch* court could reject the evidence of an order of the court of General Quarter Sessions in this country adjudging the settlement, upon the ground that their adjudication was founded on no better evidence than such a copy, and that a rule admitting that evidence was unreasonable. Sir *W. Grant*, Master of the Rolls, well lays down this doctrine in the case of *Kindersley* v. *Chase*, where he says: "It has been matter of complaint against us, (how justly, is another consideration) that we have no such code, (as the ordinance of *Louis* XIV. of 1681,) by which neutrals may learn how they may protect themselves against capture and condemnation. Now the [*French*] court in this case seems to me to have well and properly understood the effect of their own ordinances. They have not taken them as positive laws binding on neutrals, but they refer to them as establishing legitimate presumptions, from which they are warranted to draw the conclusion, that it is necessary for them to arrive at, before they are entitled to pronounce a sentence of condemnation." It cannot be conceived from read-

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ing this sentence, that the ship was condemned as lawful prize upon the ground of being a smuggler, or for any other fiscal purpose: it is apparent that she was condemned as prize of war. The ordinance, it is true, does not say in express terms that under such circumstances a ship shall be deemed enemy's property, but it says she shall not enjoy the benefits of neutrals or allies: and as there are but three known relations of nations, neutrals, allies, and belligerents, if the two former are excluded, it necessarily follows that a ship belongs to the latter. The practice of the *French* courts requires the captured to exhibit proof that the ship was not owned, and not built, by an enemy; and although there is no proof that she was owned or was built by an enemy, in the absence of evidence to the contrary, the court condemns her agreeably to those ordinances. The language of the court of *Senegal* then, in pronouncing this sentence, amounts to this; that according to the rules of evidence which have been laid down to assist them, they declare this to be enemy's property. And in all cases where the court draws the conclusion of enemy's property, whatever be the premises on which they form it, the decision is binding. In the case of *Baring* v. *Claggett*, 3 *Bos*. 201. the sentence of condemnation was entitled "the condemnation of the "*English* ship *Mount Vernon*," and Lord *Alvanley* C. J. observed, that if those words were to be deemed part of the sentence, they were of themselves imperative on the court to hold that the warranty had not been complied with, but that whether she was condemned as not being an *American*, or for not having those documents which entitled her to the privileges of an *American* flag in the court of a belligerent power, the sentence was conclusive. The case of *Barzillai* v. *Lewis*, 2 *Park*, 6 ed. 469., and many other cases, have proceeded on the same ground.

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Jennings in reply. This case exactly coincides with that of *Kindersley* v. *Chase*. The contract here is, that the ship is neutral, not that she shall be so navigated as the *French* ordinances require neutrals to be navigated; and the sentence expressly states that she is neutral, and thereby shews that the Plaintiff has complied with the warranty. *Cur. adv. vult.*

On this day MANSFIELD C. J. delivered the opinion of the Court.

The question here is, whether the sentence of condemnation on which the defence to this action is founded, is conclusive evidence against the Plaintiff, that the ship insured by this policy was not a *Danish* ship. The insurance is on a voyage to St. *Thomas*: the ship is taken in the course of her voyage, and is carried into a port in *Africa* and condemned. The sentence of condemnation was given in evidence, to prove she was not *Danish* as warranted: A special verdict was found, stating the facts. If the court were at liberty to look out of the sentence, there is very little doubt but that the sentence was wrong, and that the ship and cargo were *Danish* as warranted; but if we are not at liberty to look out of the sentence, it is very little material what were the circumstances of the case on which that sentence was given. The part of the special verdict then on which the case depends, is the sentence of the court of *Senegal* (which his Lordship read.) It is sufficient to observe, that every letter relating to the ship's papers shews that the question was, whether the vessel was *Danish*, and neutral property; and that it all goes to shew, that according to the rules prevailing in the courts of *France*, grounded on their ordinances, the property was not neutral. In several cases, sentences of foreign courts have been held not to be conclusive evidence on this head, because on the face of them it has appeared, perhaps inadvertently, that

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that the ships were condemned, not because they were enemy's property, or not neutral, but on some collateral matter, as the not having certain papers on board; but such authorities do not apply to any cases where the Courts have determined, as here, to condemn the vessel as not being neutral. If they come to the conclusion, it is quite immaterial through what media they arrive at it. Several circumstances here would have created suspicion in any court, and they could not have been mentioned in this sentence on any other ground than that of its being a question whether the property was neutral or not. In the case of *Kindersley* v. *Chase*, at the Cockpit, the Master of the Rolls has well explained in what light these sentences are to be considered. It is not that the courts of foreign nations can condemn on their own ordinances, for they do not bind other nations; but those ordinances are for the most part rules of evidence, or general principles of justice, adopted for the guidance of their own courts; and if the property is condemned thereupon, though the rules might not be found in the courts of this country, and though all the *French* directions about the ship's papers are not binding on us, we must be bound by the sentences pronounced upon those rules. Therefore the judgment of the Court below must be affirmed.

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June 21.

CLUTTERBUCK, Demandant; DEBARY, Tenant; LANGTON, Vouchee.

The Court would not permit a recovery to be amended by inserting a parish not named in the deed to make a tenant to the *præcipe*, although it appeared that the parish was named in the instructions given for preparing that deed, and that the lands were parcel of the estate of an ancestor, all whose estate was intended to pass.

THE attorney employed in this case had received instructions to prepare a deed to make a tenant to the præcipe, in order to suffer a recovery of all the messuages and lands of *W. G. Langton*, the father, and *W. G. Langton* the son, in the county of *Gloucester*, which were formerly the estate of *Bridget Langton* in fee tail, with remainder to herself in fee. Amongst these premises was *Siston* farm, which lay partly in the parish of *Siston*, and partly in the parish of *Pucklechurch*. The parish of *Pucklechurch* being inadvertently omitted both in the deed to make a tenant to the præcipe, and in the recovery.

Shepherd Serjt. now moved to amend the latter, by inserting the name of that parish. The Court were at first inclined to permit the amendment, conditionally on the parties filing an affidavit, stating the fact, which did not appear by the affidavit then before the Court, that the lands in *Pucklechurch* were parcel of the estate formerly of *Bridget Langton*; but on the affidavit of the circumstances being produced in the following term, the Court, adverting to the omission in the deed, observed that as to the land in *Pucklechurch*, there could be no good tenant to the præcipe, and therefore refused the amendment.

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June 19.

Under the *Liverpool* dock acts, 8 *Ann.* c. 12. and 2 *G.* 3. c. 86. a vessel which clears out from *Liverpool*, her home, with a cargo, and returns with a cargo, incurs only one duty, although she may have traded to intermediate ports, and sold more than one cargo during her absence.

The rate of duty shall be the rate imposed on ships trading from *Liverpool* to the most distant of the several ports to which she trades during the interval.

THIS was an action for money had and received, brought to recover back from the Defendant, who was collector of the duties payable at the docks in the port of *Liverpool*, the sum of 33*l.* 15*s.* 3*d.* which had been paid by the Plaintiffs by compulsion, and under a protest. Upon the trial of this cause at *Lancaster*, at the Spring assizes 1809, a special verdict was found, which stated in substance, "that the ship *Kelton*, whereof the Plaintiffs then and still were the owners, belonging to and registered at the port of *Liverpool*, was in *September* 1807 about to clear outwards from *Liverpool* with a cargo of goods for *Halifax* in *North America;* and that thereupon the Defendant, being the collector of the dock duties of the port of *Liverpool*, as such demanded from the Plaintiffs, as the owners of the said ship, payment of 33*l.* 15*s.* 3*d.* as and for the *Liverpool* dock duty, by him insisted to be payable on her so clearing out, and refused to permit the ship to clear out until the same should be paid. Whereupon the plaintiffs, as the owners of the said ship, paid to the Defendant, as such collector, the sum of 33*l.* 15*s.* 3*d.* in order to enable the ship to clear out and proceed from *Liverpool* for *Halifax*. That the ship did thereupon clear out and proceed with her cargo from *Liverpool* to *Halifax*, where the same was discharged, and another cargo was shipped on board the said ship at *Halifax* for *Demarara* in *South America;* with which last mentioned cargo the same ship afterwards sailed from *Halifax* and arrived at *Demarara*, where the same goods were discharged, and another cargo of goods was thereupon shipped on board the same ship at *Demarara* for *Liverpool*, with which last mentioned cargo the same ship afterwards sailed from *Demarara* for *Liverpool*, and with the

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the same cargo arrived there in *June* 1808. That upon her arrival at *Liverpool*, the Defendant, as such collector, demanded from the Plaintiffs, as the owners of the ship, payment of a further sum of 33*l.* 15*s.* 3*d.* as and for the *Liverpool* dock duty, by him insisted to be payable on her entry inwards, and refused to admit the ship to enter until the same should be paid. Whereupon the Plaintiffs, as such owners, paid to the Defendant, as such collector, the sum of 33*l.* 15*s.* 3*d.* in order to obtain an entry inwards for the said ship into the said port of *Liverpool*, having first protested to the Defendant, as such collector, against the validity of the demand. But whether, &c.

The duties in question were first created by an act passed 8 *Ann.* *c.* 12. the preamble of which recites that the entries into the port of *Liverpool* had been found so dangerous and difficult, that great numbers of strangers and others had frequently lost their lives, as well as ships and goods, for want of proper land-marks, buoys, and other directions into the said harbour, and when such ships had entered the said port, had been exposed to great dangers for want of a convenient wet dock or bason; and that it was conceived to be highly necessary for the preservation of ships, that a convenient wet dock or bason should be made, and that at the entrance into the said port and harbour, buoys should be placed, and necessary land-marks erected: and also reciting that the mayor, aldermen, bailiffs, and common council of the borough, in order for making the said dock or bason, had granted a piece of ground, containing four acres or thereabouts, parcel of the waste of and belonging to the said borough and corporation. But forasmuch as making the said dock or bason, and the sluices and canals thereto intended to belong, and for preserving and maintaining the same (when made), would cost more than the inhabitants of the borough and corporation could raise, and that

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that the same could not be effected without the aid and assistance of all persons trading to and from the same; and the hazard and danger all ships are exposed to for want of such advantages, would be by this means in a great measure taken away; it was by the first section enacted, that the said piece of ground should for ever be and remain to the use, intent, and purpose before mentioned. And by the third section it was enacted, that for the better effecting and support of the premises, there should, from the 24th of *June* 1710, for the term of 21 years, be paid unto the mayor, &c. or to their collectors or deputies, for every vessel, (the Queen's ships of war, and others employed in her majesty's service only excepted,) *trading or coming into or out of the said port* with any goods or merchandize, (the limits and extent whereof are as far as a certain place in *Hoylake* called *the Redstones*, and from thence all over the river *Mersey* to *Warrington* and *Frodsham* bridges,) by the master, owner or owners of such ship, the several rates, tonnage, keelage, or duties (according to the full of their reach and burthen,) thereinafter particularly rated and described, for every ton of burthen of such ship, &c. (that is to say,) for every vessel using the coasting trade of this kingdom, trading to, and from the said port to any part of *Britain* or *Wales*, the several rates and duties following, (that is to say,) for every ship so trading between the said port and *St. David's Head*, or *Carlisle*, 2*d.* per ton; and for every vessel trading between *St. David's Head*, and the Land's end, or beyond *Carlisle*, to any part in or on this side the *Shetlands*, or to and from the *Isle of Man*, 3*d.* per ton; and for every vessel trading to any part of *Ireland*, up the Queen's channel beyond the Land's end, or beyond the *Shetlands*, 4*d.* per ton; for every vessel trading to and from *Norway*, &c. 8*d.* per ton; for every vessel trading to and from *Newfoundland*, &c. 1*s.* per

 ton;

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ton; for every vessel trading to and from the *West Indies*, *Virginia*, or any other part of *America*, &c. not named before, 1*s*. 6*d*. per ton. The fourth section directed that such duties should be paid *at the time of such ship's discharge, either inwards or outwards, at the custom-house in the said port, so as no ship should be subject or liable to pay the duty but once for the same voyage, both out and home, notwithstanding such ship might go out and return back with a lading of any goods or merchandize.* It was provided by the 17th section, that the duties should not attach on any vessel which should be forced into the harbour by distress of weather, or of the enemy, or otherwise, and should in the said harbour or dock discharge or unlade, in order to repair any damage done to, or sustained by such ship or vessel, and should relade the goods and merchandizes so discharged or unladen; nor to charge any ship or vessel with the duties aforesaid, which should sell and deliver in the said harbour or dock any part of her lading, only in order to repair, refit, or victual; or for any other necessary services of such ship or vessel; or, (by the 18th section,) on any vessel belonging to, or bound to or from the port of *Chester*, and coming within the limits aforesaid, in case such ship should neither load nor discharge the goods therein, within the limits of the said port of *Liverpool*. By another statute passed in 2 *G*. 3. *c*. 86. *s*. 7. it was enacted, that the tonnage duties to be thereafter paid, or made payable by any of the said former acts, or that act, upon all vessels coming into or arriving in the port of *Liverpool*, should be made due, payable, and be paid at the dock office to be kept in *Liverpool*, to the receiver or collector of the dock duties for the time being, upon the arrival of every such vessel inwards at *Liverpool*, and before such vessel should be discharged, or cleared inwards at the custom-house, or by any custom-house officer.

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Lens Serjt. for the Plaintiff, assumed, that in ordinary voyages only one duty was payable under these acts of parliament for one voyage out and home, and that the question here was merely this, whether the circumstances of the ship going to *Halifax*, changing her cargo there, and proceeding to *Demarara*, there discharging, and taking in a fresh cargo for *England*, constituted, within the meaning of these acts, one voyage or two. And he contended that this was only one voyage within the meaning of the third section of 8 *Ann.* which imposes the rates; the act is carelessly drawn, and does not preserve the same form of expression; sometimes it speaks of vessels trading *between* two places, and *to* another, sometimes of vessels trading *to* a place, sometimes of trading *up the Channel*, but most frequently of vessels trading *to and from* the parts mentioned; which shews that a trading to one place, and again a trading from some place to the port of *Liverpool*, are comprehended under the liability to the single duty. With relation to the port of *Liverpool*, it must be quite immaterial at how many intermediate places the ship touches while she is out. The consideration for the payment of the tolls, is her enjoyment of the dock while she is at *Liverpool*, and the conveniences of that port are equal in degree while she is there, and therefore require only the same amount of compensation, whether the vessel goes only to *Halifax*, or proceeds to any further place. The identity of the voyage, in the sense in which it is used in cases of insurance, is wholly foreign to the question. There indeed it is necessary to ascertain the risk insured, and in that view, the question whether a voyage is the same voyage, may often be material. If a ship comes to *Liverpool* from several ports, she may so far be considered as making a voyage from each of those ports, that the same rate of duty may be due, which is payable in respect of a ship coming from the most distant of them,

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but no further. But to what number of ports soever the captain of the ship may chuse to go, is in all other respects wholly immaterial.

Williams Serjt. *contrà*. It will appear upon that part of the special verdict which states the trading to *Halifax*, *Demarara*, and *Liverpool*, that within the purview of this act two voyages have been performed. The statute directs that there shall be paid "for every ship trading or coming into or out of the said port with any goods and merchandizes, the duties following, viz. for every ship using the coasting trade, and trading to and from the said port to any port of *Britain* or *Wales*, the duties following, viz. for every ship so trading between the said port and *St. David's Head*, &c. two-pence, &c.:" the words "so trading" must be explained by what has gone before, and each of the clauses fixing the different rates of tolls must be read in the same way as if the first words to which the expression "so trading" refers, were repeated in every member of the clause. It would then stand thus in respect to the present case; "for every ship trading to and from *America*, &c. trading or coming into *or* out of the said port with any goods or merchandizes, for every ton the sum of 1*s*. 6*d*." The first section having regulated the amount of the duty, the second directs when they shall accrue. Such duties to be paid at the time of the ship's discharge either inwards or outwards, at the custom-house in the said port. Had the act stopped here, every laden ship would have been liable to pay a duty both on coming in and on going out of the port. But a proviso follows, "so as no ship shall be liable to pay the duty but once for the same voyage both out and home, notwithstanding such ship may go out and return back with a cargo; and the proviso is very specially and particularly worded, and its import is very confined: for it does not say that no ship shall pay more than once, notwithstanding that such ship shall both go out

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out and return back laden with goods, but that the ship shall not be liable to pay more than once for the *same voyage out and home*, although laden: the legislature contemplated therefore, that in once going out laden, and once returning home laden, the ship might under some circumstances perform two distinct voyages; and it has made the identity of the voyage, therefore, a necessary condition to discharge the ship of the second duty. The degree of accommodation which may be received from the dock, is not the measure according to which the parliament has settled these tolls. They are not made payable upon a ship's entering or quitting the dock, but on entering or going out of the port of *Liverpool*, the extent of which is described in the acts, and is very great. If a ship enters the *Mersey* she is liable to the duty, though she receives no accommodation from the dock; and it may be legally and logically inferred, that every ship coming into any part of the port of *Liverpool*, even against the will of the master, would be also liable to the duty; except for *s.* 17. which exempts vessels forced by stress of weather or an enemy into the harbour, (not into the dock,) and which shall unlade only for the purpose of repairing and relading; or even which should not unlade at all. Another exemption is enacted in favour of ships coming into and out of the port of *Chester*, all of which would otherwise be liable. But a vessel which lies in the docks for many months together, and goes out in ballast for want of a cargo, pays nothing; so a packet which sails from *Liverpool* to *Holyhead*, and almost daily has the use of the docks, pays nothing; for it is not, within the meaning of the third clause, laden with goods or merchandizes. It is, therefore, plain that the degree of accommodation is not the criterion by which the legislature estimates the liability to pay; otherwise the ship would pay duty in the ratio of the time she remained in port; but the tolls are proportioned not to that circumstance,

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stance, but to the length of the voyage: the legislature probably assumed that the longer was the voyage, the greater would be the profit, and justly has enacted that where the ship has no cargo, which is the misfortune of the owners, equally as of the trustees of the port, the loss shall not fall on the owners alone. If this ship had been cleared out for *Halifax* and *Demarara*, and had discharged her cargo at *Demarara*, there might have been some ground to contend that it was one and the same voyage out and home: but the ship is cleared out for *Halifax* only: she discharges her cargo there, takes another cargo for *Demarara*, discharges that, and there takes a third cargo for *England*. If there be any exception which protects the Defendant from the general enactment of the statute imposing the duty both on going out and coming in, it is for the Defendant to shew it in pleading: otherwise he remains within the general scope and body of the act. The meaning of the act is, that when a ship goes out to a definite port, and receives a cargo directly homeward-bound, that shall be considered as one and the same voyage: not so if she proceeds to any further port. The construction which the Plaintiff contends for would render the words "trading or coming in or out" wholly useless, and synonymous with "trading to and from," which is merely descriptive of the vessel, and does not denote the event on which the toll accrues: but it is a rule that every word must be made sensible if possible. And according to the Defendant's construction these words are material, and cannot be rejected.

Lens, in reply. The Defendant's argument rests on a mere verbal criticism; and though it is contended that the use of the docks is not the consideration for the duty, yet no other consideration has been pointed out. But the preamble which recites several inconveniences in

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the then subsisting state of the harbour; the want of buoys and landmarks, by which many strangers have lost their ships and goods, and the want of a convenient bason for vessels to lie in, shews that the accommodation is the consideration for the duty; and the act is compulsory on every vessel to load and unload in the docks, and not elsewhere. The words "into *or* out of," in this act, on which stress has been laid, do not recur so frequently as the words "into *and* out of;" the two phrases are used indiscriminately, to express the same thing; and the whole act, being taken together, does not support the Defendant's argument; nor is it clear, that on the act, but for the exemption, the duty would be payable both on coming in and on going out. That sentence of the act which gives the restriction is to be read as part of the third section, which imposes the duty; it is not a separate section; and where the restriction is part of the same clause which imposes the duty, it is for the Plaintiff to bring the Defendant within the duty, not for the Defendant to shew himself discharged. It is admitted that if this had been a voyage to *Halifax* and *Demarara*, and back, it would have been one and the same voyage; and it can make no difference whether the whole destination is declared before the ship sails or not; the officers of the port have no right to restrain her voyage, and if she declares it before she sails, she may renounce it at sea, provided that she pays the highest rate of duty which attaches on a voyage from any of the ports from which she may return: but the duty accrues only once, and paying that single duty, she may sail round the world. If the collector chooses to collect the duty before the vessel sails, it is only necessary for him to know the extreme point to which she is destined to go before her return.

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MANSFIELD C. J. This case depends entirely on the meaning of the 4th section. The act recites great danger from want of buoys, &c. and great want of docks; and that the mayor, &c. have devoted a piece of ground for the purpose of making a dock, and enacts that the mayor, &c. may make a dock; and of course, referring to the purpose of satisfying the expences of all these works, it enacts, that certain duties shall be payable for every ship coming into or going out of the said port; and it makes the place to which the ship goes, or from which it comes, the measure of the amount of duty; contemplating, I suppose, that a ship coming from a short voyage, would make more frequent trips, and that though it paid less at once, it would pay more in the year: then comes the fourth section, the words of which are, the duties to be paid at the time of the ship's discharge, either inwards or outwards, so as no ship shall be liable to pay the duty but once for the same voyage both out and home, notwithstanding such ship may go out and return back with a lading of any goods or merchandize. What then is the case here? How many voyages out, and how many home, are here? One. Only one voyage out, and one voyage home; so that I have very great difficulty to say how the act can be construed otherwise than the Plaintiff contends. Nothing in the act restrains the voyage, or says that the ship shall not vary it while she is out, or prescribes that she shall come home the shortest way: she may go to any ports she pleases, and pay toll from the furthest port, and it is only one voyage out and one voyage home.

HEATH J. I am of the same opinion: This is only one voyage. But it is said that the duty is paid for the buoys as well as for the dock: it is so, but that does not vary the circumstances under which the right arises; the duty

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duty only accrues in respect of the ship's coming into and being in the port. No sound inference against this conclusion arises from there being an exception in favour of ships in distress: the legislature justly thought it would be inhumanity to make a ship distressed pay for coming into the port. So there may be some good reason for exempting the *Chester* vessels, either that they are driven within the port of *Liverpool*, or some other good reason which we may not be acquainted with.

LAWRENCE J. This case lies in so narrow a compass that I cannot amplify it by any argument. The act imposes only one duty on one voyage. This is but one voyage, and therefore only liable to one duty.

CHAMBRE J. I entirely concur: it is far too clear to be capable of being rendered clearer by any farther argument.

Judgment for the Plaintiff.

CASWELL v. COARE.

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Where the substantive cause of action does not require special bail without an order, if the Plaintiff holds the defendant to bail on the money counts, and recovers nothing thereon, the Court, on motion, will discharge the bail from their recognizance.

IN this case, the facts of which are reported *ante*, 1st vol. 566. the Plaintiff had held the Defendant to special bail for 20*l*. and upwards, without a Judge's order: he had declared in *assumpsit* on a breach of the warranty of a horse, and had added the money counts; and at the trial went for, and recovered, a sum expended for the keep of the horse after a supposed tender and refusal. The Court, on the motion for a new trial, being clear in opinion that nothing was due for the keep of the horse, and having reduced the verdict accordingly, *Cockell* Serjt. for the Defendant, had on the last day of *Easter* term obtained a rule *nisi*, that an *exoneretur* might be

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be entered on the bail piece, and that the Plaintiff might repay the defendant 5*l.* for the costs of the bail bond, because the Plaintiff was not entitled to special bail in an action on a warranty, without a Judge's order.

Best Serjt. now shewed cause. The verdict, although reduced to 20*l.* is taken generally on all the counts; therefore so long as it remains, the bail are liable; and before this motion could be made, the Defendant should first have moved that the verdict might be taken on the count upon the warranty only. But there was also a fair ground for the Plaintiff to suppose that he was entitled to recover upon the count for money had and received, in consequence of the failure of the condition of warranty.

Lens Serjt., in the absence of *Cockell*, supported the rule. The residue of the verdict was obtained not on the count for money had and received, but on the count for money paid for the keep of the horse.

The Court at first observed that this was a motion novel in its nature, and that an action for maliciously holding to bail would be the proper remedy: but on its being suggested by *Lens* that the Defendant might probably be unable to prove malice, though he was improperly held to bail, and that the motion did not go to discharge the Defendant, but the bail only, whose security had been improperly required in the first instance, the Court considered, that if the Plaintiff should proceed here against the bail, he would proceed against them on a judgment for 20*l.* on the money counts, when he had failed to recover any thing thereon, and had succeeded only on the warranty; and they therefore made the rule absolute as to entering the *exoneretur*, but discharged it as to the costs of the bail-bond.

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DOE, on the several Demises of HENRY LEICESTER, Esq. and ANN his Wife, RICHARD JOHNSON and WILLIAM CHIPPENDALL, ANN LEICESTER, and HENRY LEICESTER, *v.* BIGGS.

Devise in trust to pay unto, or else to permit and suffer the testator's niece to receive the rents. Held that the legal estate was executed in the niece, because the words "to permit" came last, and in a deed the first, in a will the last words prevail.

A devise in trust to pay unto gives the legal estate to the trustee.

If half a year's notice requires a tenant to quit at the same time of the year at which he has usually paid rent, and he does not, on receiving it, object to the time, this is sufficient evidence that the year of his tenancy determines at the time mentioned in the notice.

THIS was an ejectment brought to recover certain premises in *Middlesex*. Upon the trial at the *Middlesex* sittings after *Hilary* term 1809, before *Mansfield* C. J. the case appeared to be this: *Josiah Cole*, being seised in fee of the premises, by his will, dated the 31st of *March* 1770, devised them unto *John Moore* and *Joseph Skinner*, and the survivor of them, to hold to them and the survivor, and his heirs and assigns, upon trust to permit and suffer the testator's wife to have, receive, and take the rents, issues, and profits thereof, during her natural life, for her own absolute use and benefit, and from and after her decease, in case the testator's niece *Ann Cole* should be then living, in trust *to pay unto, or permit and suffer his said niece* Ann Cole *to have, receive, and take* the rents, issues, and profits thereof, for her natural life, with remainders over; and he made his wife his executrix. *Ann Cole*, after the testator's decease, intermarried with *Henry Leicester*. A verdict having been found for the Plaintiff, *Shepherd* Serjt., in last *Easter* term, obtained a rule *nisi* to set it aside and enter a nonsuit, upon the ground that there was no count on the demise of *Moore*, the devisee, who had survived *Skinner*, and that the legal estate was in the devisees in trust under the will: he also moved it on another ground, that although half a year's notice to quit was proved on the part of the Plaintiff, there was no proof at what time of the year the Defendant's tenancy commenced; but *Mansfield* C. J. observed, that the tenant on receiving the notice, made no objection to the terms of it; and the

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the Plaintiff proved a receipt of rent at *Midsummer* and *Christmas*; and the Court refused the rule on that point.

Vaughan and *Manley* Serjts. shewed cause against the rule. It is now clear, that unless either trustees have some active duty imposed on them, such as the doing of some repairs, or the payment of annuities, or other disbursements, which renders it necessary that they should have the legal estate, or unless it is devised to them with a view to the sole and separate use of a married woman, which has always been deemed *per se* sufficient ground to hold it a use executed in the trustees, the legal estate is in the person who has the beneficial interest. Thus, in 2 *T. R.* 445. *Silvester d. Law* v. *Wilson*, an authority which was mentioned when the rule was obtained, the devise was to take and receive the rents, and the testator thereby ordered, "that such rents should be applied for "the subsistence and maintenance of his son," and *Ashurst* J. dwelt upon this circumstance, and thought that the testator wished that the trustees should have an eye to the application of the money. But no case is to be found where the trustees have been held to take the legal estate, if they had nothing assigned them to do but to receive and pay over the rents. *Carth* v. *Baldwin*, 2 *Ves.* 646. *Bagshaw* v. *Spencer*, 1 *Ves.* 144. The foundation of all these cases was that of *Jones* v. *Lord Say and Sele*, 2 *Vin. Abr.* 262. which is the best report of it; S. C. *Eq. Cas. Abr.* 383. but that was the case of a feme covert, and there were also annuities to be paid by the trustees. In 7 *T. R.* 653. *Harton* v. *Harton*, Lord *Kenyon* C. J. said, that the provision in that case appeared to be made in order to secure to the several femes covert a separate allowance, free from the controul of their husbands; to effectuate which, it was essentially necessary that the trustees should take an estate with the

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use executed; otherwise the husband of each taker would be entitled to receive the profits, and so defeat the very object the devisor had in view: his Lordship also remarked on *Jones* v. *Say and Sele*, that it was a case by itself. [*Mansfield* C. J. I have always understood that decision to have gone on the ground you mention, that it was the case of a feme covert, and was so held in order to protect her.] In 3 *Bos.* 175. *Kenrick* v. *Lord William Beauclerk*, *Lens* Serjt. argued wholly on the ground that there was something in that case to be done by the trustees; and Lord *Alvanley* C. J. in giving judgment, cited with approbation the collection of the authorities made in *Jefferson* v. *Morton*, 2 *Williams's Saunders*, 11. *c. n.* 17. and the terms in which the learned editor has there laid down the rule. *Shapland* v. *Smith*, 1 *Bro. Cha. Cas.* 75. is to the same effect, and the law there laid down by *Eyre* B. has never been contested; but on the contrary it is now understood in the Court of Chancery, that the distinction is abolished. *Eyre* B. held that there was no difference between a demise in trust to permit to receive, and a demise in trust to receive and pay over; but he mistook the facts of that case; for the trustees there had to pay taxes and repairs, which he did not advert to. Here nothing is required to be done by the trustees; and there is no necessity for their taking the legal estate. The trustees are not even made the testator's executors; his widow is his executrix.

Shepherd and *Best* Serjts. *contrà*. Wherever there is a devise in trust to receive the rents and profits, the use is executed in the usee. *Simpson* v. *Turner*, 1 *Eq. Cas. Abr.* 383. *n.* and there the trustees had nothing to do but to receive and pay over. But where the devise has been to permit and suffer the party beneficially interested to receive, it has been a legal estate executed in the *cestui*

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que use, unless where circumstances required it to be otherwise, for the protection of a feme covert, or for otherwise effectuating the particular intentions of the testator. In the present case, where both phrases are used in the alternative, the former words do not so far control the latter, as to take out of the trustees the legal estate thereby given, which it is for the interest of the *cestui que trust* that the trustees should retain. The effect of this alternative merely is, to give the trustees a discretion whether they will let the *cestui que trust* receive the rents, or will themselves receive them; and in order to possess that discretion, the trustee must necessarily have the legal estate in him. The discretion must be lodged in some one, and in whom can it be, unless in the trustee? This case, in which the husband and wife are separated, is an instance which shews that it is extremely proper that the trustee under such a devise should have the estate vested in him; and he here has as many duties to perform, as were cast on the trustees in any of the cases cited. Where the devise is to a woman, it is peculiarly necessary that the trustee should have the legal estate, in order to protect her against the husband: if the estate is in trustees they may insist on a settlement, or may from time to time pay the rents into the woman's own hand; and if the legal estate is in the trustees, and they have made a lease, it will prevail, unless they establish a forfeiture incurred by a breach of covenant.

MANSFIELD C. J. I thought that it had been settled by the case of *Shapland* v. *Smith*, that the distinction was abolished, unless in cases where something especial was to be done by the trustee, as to pay rates or repairs; but I find it is otherwise. It is miraculous how the distinction ever became established; for good sense requires that in both cases it should equally be a trust, and that the estate should be executed in the trustee; for how can

can a man be said to permit and suffer, who has no estate, and no power to hinder the *cestui que trust* from receiving.

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Cur. adv. vult.

On this day judgment was pronounced by

MANSFIELD C. J. This case might be argued and considered for ever without advancing it at all in law, reason, or precedent. But as it happens, in this will, the last words are, "permit and suffer," which give the *cestui que trust* a legal estate; and the general rule is, that if there be a repugnancy, the first words in a deed, and the last words in a will, shall prevail; and consequently, for want of a better reason, we are forced to say that we think this will gives the legal estate to the party beneficially interested. The rule for a new trial must therefore be

Discharged.

TROUGHTON *v.* CLARKE and BOREHAM, Bail.

June 12.

In the Common Pleas, no *capias ad satisfaciendum* lies on a judgment on a *scire facias* against bail. Otherwise in *B. R.* Otherwise in debt on recognizance in *C. B.*

BEST Serj. had yesterday obtained a rule *nisi* that the Defendants, who had been taken in execution on a *capias ad satisfaciendum*, issued on a judgment obtained on a writ of *scire facias* upon their recognizance of bail, might be discharged out of custody, by reason that a *capias* does not lie on a judgment in *scire facias* against the bail, who, in this court, undertake by their recognizance only that the condemnation money may be levied of their goods and chattels, lands and tenements. The authorities cited in support of this position were *Hetley*, 119. *Anon. Litt.* 238. *Rigault* v. *Carrick*, 1 *Ro. Abr.* 897, *line* 35. (where it is said, the case is different

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TROUGHTON v. CLARKE and Another.

on a judgment in debt on the recognizance,) S. C. 2 *Danv.* 498. *p.* 7. 3 *Danv.* 326. *Puttenham's case*, *Dy.* 306. And although by the course of practice in the Court of King's Bench, a *capias ad satisfaciendum* is permitted in this case, *Gee* v. *Fane*, 1 *Lev.* 225. yet in this court the practice has always been otherwise. *Cro. Jac.* 450. "In the Common Bench, because there is always a recognizance in a sum certain when the bail is entered, "the execution is always *elegit*, or *fieri facias*, and not "a *capias ad satisfaciendum*."

Lens Serjt. for the Plaintiff, on this day prayed that the rule might be enlarged, in order to give him time to look into the authorities.

The Bench lamented the diversity in the practice of the two courts, but directed that the rule should be made absolute, unless cause to the contrary should be shewn at a subsequent day before a Judge at chambers; on which day the Defendant's agent attended before *Lawrence* J., and the Plaintiffs not having been able, it is to be presumed, to find any authorities to the contrary, did not attend: consequently the rule was made

Absolute (*a*).

1810. *Jan.* 25.

(*a*) BAYLY *v.* TITMASS.

Best Serjt. moved to set aside a judgment and warrant of attorney, which in *Sept.* 1808, had been given by the Defendants, without their attorney being present, upon their being taken in execution under a writ of *capias ad satisfaciendum* issued against them upon a judgment on a bail recognizance.

Per Curiam. Although in the Court of King's Bench you can take the person of the bail, yet here you can only take their property. But these Defendants being improperly taken in execution, and entitled to their discharge, prefer to cheat the Plaintiff by giving a warrant of attorney payable by instalments, and after lying by a year and a half, they apply to have it set aside.

Rule refused.

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WHITAKER *v.* IZOD.

The Court in compelling a Plaintiff to exhibit evidence to which the Defendant is entitled to have access, will not compel him to lay himself open to a prosecution under the stamp acts.

THE Defendant, who was a baker, had for several months dealt with the Plaintiff, who was a corn-factor, for flour; and for some time regular receipts were given for the sums paid. After a time the Defendant desired the Plaintiff would keep a book, in which the flour delivered should be entered on the one side, and the money paid on the other. This was accordingly done, and after the balance had been struck two or three times, a balance of 140*l.* appeared due: the Plaintiff then refused to furnish any more flour till that sum should be paid, and commenced the present action to recover it. The book was in the Plaintiff's possession, and the Defendant had on a former day obtained a rule *nisi* to stay the proceedings, until the book should be exhibited to the Defendant.

Shepherd Serjt. now shewed cause against this rule, upon an affidavit, that a friend of the Defendant's, an under officer of the stamp office, had called on the Plaintiff, and desired to have possession of the book; and on his refusal, had told him, that it did not matter, for that the Plaintiff could not recover the balance without producing the book, on which occasion copies could be obtained of it, and penalties on the stamp acts to the amount of 800*l.* could be recovered against him.

The Court ordered that the book should be delivered to the Defendant's attorney, upon his personally undertaking that it should not be shewn to the Defendant himself, or to any officer of the stamp office, nor any copies made of it: and directed that the Plaintiff should give stamped receipts for each of the sums mentioned in the entries in the book; and that as soon as the Defendant's

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attorney should have compared the book with those receipts, and found them accurate, the book should be restored to the custody of the Plaintiff.



June 21.

Grimstead, Executor of Grimstead, v. Shirley.

Where a Plaintiff, executor, adds one count as executor, stating a cause of action for which he might declare in his own right, if he is nonsuited, he shall be liable to costs.

THE Plaintiff in his first count declared, that the testator in his life was possessed of certain goods, and casually lost them, and that before his death they came by finding to the Defendant's possession, who knowing, &c. but contriving to defraud the testator in his lifetime, and since his death the Plaintiff as such executor, did not deliver, &c.; and afterwards, in the testator's lifetime, converted the same. The second count averred, that the testator was possessed of the goods, and lost them, and the same came to the Defendant's possession, who knowing them to be the property of the testator in his life, and of right to belong to the Plaintiff as such executor, but contriving to defraud the Plaintiff as such executor, had not delivered them to the testator in his life, or to the Plaintiff, executor as aforesaid, since his decease, and after the testator's decease converted the same. The question in this case was, whether the articles mentioned in the declaration, and which had been left in the Defendant's house, where the testator lived many years and died, had been given by the testator to the Defendant in his lifetime or not. The Plaintiff was nonsuited.

Shepherd Serjt. in *Michaelmas* term 1808, obtained a rule *nisi*, that the prothonotary might tax the costs for the Defendant. The Defendant, he said, might sue in his own right upon the last conversion here stated, which clearly

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clearly was in his own time, if at all. The case of *Cockerill* v. *Kynaston*, 4 *T. R.* 277. in which it was held that an executor under such circumstances was not liable to pay costs, has been overruled in the subsequent case of *Bollard* v. *Spencer*, 7 *T. R.* 358.

Best Serjt. shewed cause. The Defendant is not entitled to his costs on the authority of the case cited. To entitle him, it is necessary that the Plaintiff should have reduced these goods into his actual possession before the cause of action arose. But in both counts this Plaintiff declares on the possession of his testator. In *Cockerill* v. *Kynaston*, there were three counts, first, a trover and conversion both in the testator's life. 2. A trover in the testator's life, and a conversion afterwards. 3. A trover upon the possession of the executor, after the testator's decease, and a subsequent conversion; this may be collected from the language both of Lord *Kenyon* and of *Buller* J.; the former says, "the only evidence given was "applicable to the first count;" the latter says, "even "on the third count we are not to conclude that the exe-"cutrix ever had actual possession of the goods; and if "not, they are not assets till recovered." In *Bollard* v. *Spencer*, the Court held, that the question could not depend on any facts but those which appeared on the record; and the Court noticed that there must be some mistake in the case of *Cockerill* v. *Kynaston*. [*Lawrence* J. observed, that there must be some error in the note of *Bollard* v. *Spencer*, for *Buller* J. is there supposed to have said in the former case, "that if the goods which were the subject of the action of trover, had never been in the actual possession of the executrix, it was absolutely necessary for her to declare in that character:" for nothing can be clearer than this, that in trover the property is sufficient, in trespass the possession is necessary.]

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Shepherd Serjt. *contrà.* The case of *Bollard* v. *Spencer* is precisely the same as this. The question cannot depend on the mere form of the declaration, otherwise the rule, that an executor who sues in his own right shall be liable to costs, will be wholly nugatory; for every one who may sue as well in his own right as in the character of executor, will add a count as executor to save himself from costs. In the case of *Cockerill* v. *Kynaston*, the observation of Lord *Kenyon*, that all the evidence applied to the first count, which was on a possession of the testator, for a trover and conversion in his lifetime, would have been irrelevant, if the matter were to be decided on the face of the record only; but here the fact which the Plaintiff relied on as an act of conversion, was after the testator's decease, as plainly appeared at the trial. [*Lawrence* J. How can it depend on the facts which appear at the trial? Suppose the cause is called on, and no evidence is given, but the Plaintiff, instead of appearing, submits to a nonsuit, we cannot see how the facts were. The Plaintiff must take care to have his verdict on the right count, and then, if the Court gives costs where it ought not, it is error: but the Court can look only at the record.] In a court of error, nothing would appear on the record, but that the Plaintiff did not prosecute his suit; the judgment of nonsuit is in all cases the same; and it would not appear for what reason it had been given, whether on a discussion of the merits of the case, or because the Plaintiff would not try them. And if the rule as to costs depends wholly on the record, all that the Court has ever done on reasons of law must be wrong. No vigilance of the Defendant can prevent the Plaintiff from being nonsuited upon the whole declaration whenever he pleases: and if the Defendant obtains a verdict subversive of the Plaintiff's whole demand, he necessarily obtains it on all the counts; he cannot, like a Plaintiff, elect on which count he will enter it. Will it then in either of these

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cases suffice to protect the Plaintiff from costs, that in prosecuting an unfounded claim, merely for his own benefit, he has added one count in the character of executor? That is directly in opposition to the adjudged cases.

Cur. adv. vult.

MANSFIELD C. J. This motion has hung over a great while. The question turns merely on the authorities. The single point is, whether, as one count states a trover and conversion in the time of the testator, and the other a finding and conversion in the time of the executor, the executor is liable to the payment of costs. There are various and contradictory decisions on this point, but the later authorities are, that where an executor may declare in his own right, he shall be liable for costs: and here as the executor might have declared in his own right, he is liable to pay the costs. I hope this will be the last time the point will be debated here, or in any of the courts.

Rule absolute to tax the Defendant's costs.

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The seller of corn by sample in a market, is benefited by the market, as well as the seller of corn which is pitched there in bulk and sold.

And if he refuses to pay the same toll which is paid by the seller of corn in bulk, an action on the case lies against him for the injury done to the market, in selling by sample.

The burgage tenants in *Tewkesbury* are not exempt from payment of toll in the market there.

Ancient charters, of obscure or dubious meaning, shall be expounded by contemporaneous usage.

A grant of immunity to burgesses, their heirs and successors, was expounded by the usage to be a grant to the burgesses, corporators only; and not to the burgage tenants and their heirs.

If the grantee of a royal franchise, as toll, grant an immunity thereout, and the franchise of toll afterwards become extinct by unity of possession in the crown, the immunity does not thereby cease; and if the crown re-grants the toll, the grantee must take it still subject to the immunity.

THIS was an action on the case: the first count of the declaration stated, that the Plaintiffs on the 7th day of *January* 1807, and long before, and still, were lawfully possessed of a certain market holden in *Tewkesbury*, upon a *Wednesday* in every week throughout the year, except upon *Christmas-day* when it happened on a *Wednesday*, for the buying and selling of corn and grain, and other merchandizes usually sold in markets, and that by reason thereof the Plaintiffs of right ought to have a reasonable toll of all corn and grain brought into the market to be sold, and there sold on any such market day, not being corn or grain sold in that market *by or to any freeman of the borough*, nor the corn or grain of any other person or persons legally exempt from the payment of such toll, that is to say, one peck, to wit, two gallons and one quart, of and for every 48 bushels of corn or grain, each bushel containing 9 gallons of corn or grain, during all the time aforesaid brought within the said market to be sold, and there sold, and so in proportion for a greater or lesser quantity; yet the Defendant, well knowing the premises, but contriving and fraudulently and maliciously intending to injure and prejudice the Plaintiffs in this behalf, and to defraud and deprive them of a great part of the tolls and profits of their market, and to hinder them from enjoying the benefit and profit of their market in so ample and beneficial a manner as of

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right they ought to enjoy the same, on *Wednesday* the 7th of *January*, being a market day, the Defendant not being a freeman of the borough, nor a person legally exempt from the payment of the toll, wrongfully, injuriously, deceitfully, and fraudulently sold in the said market in *Tewkesbury*, to one *Joseph Buckle*, then not being a freeman of the borough, nor a person legally exempt from the payment of the toll, 45 bushels of beans, by sample, that is to say, of the same and like quality with a small parcel of beans, which the Defendant then and there produced to the said *Joseph* as and for a sample of the beans so sold; the said beans or any part thereof not being in the market at the time of the sale, nor brought by the Defendant into the market to be there sold, and the Defendant then and there well knowing that the said beans had not been brought to the market to be sold, and were not in the market at the time of selling thereof, the Defendant having wilfully and fraudulently omitted to bring the said beans to the market, to deprive the Plaintiffs of the tolls thereof; whereby the Plaintiffs were prevented from taking, and did not, nor could take their toll due to them as aforesaid, of, from, and out of the said beans, as they might and should have done if the same had been brought and placed in the market by the Defendant to be there sold, and had been there sold: but lost and were deprived of the same toll, and could not have and enjoy their market, and the tolls and profits thereof, in so ample and beneficial a manner as of right they ought to have had, and still of right ought to have and enjoy the same, to wit, at *Tewkesbury*. There were three other counts in the declaration, varying from the first in some minute particulars but not essential to the statement of this case: the Defendant pleaded the general issue; and the cause was tried before *Chambre* J. at *Gloucester*, at the Spring assizes 1808, when a verdict was found for the Plaintiffs with

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with 1*s*. damages, subject to the opinion of this Court, on a case, the parts of which principally relied on were as follows:

A market hath from time immemorial been holden at *Tewkesbury* on every *Wednesday* in the year, except on *Christmas-day* when it happens to fall on a *Wednesday*, for the sale of corn and other dead victuals and merchandize. All corn and grain brought into this market to be sold, and there sold in bulk, has from time immemorial paid a toll of 12 dishes, amounting to one peck, on every 48 bushels, and so proportionably more or less according to the quantity, unless the buyer or seller thereof hath been a person exempt from such toll. By an inquisition taken in the 8th year of King *Edward* the Second, upon the death of *Gilbert de Clare*, Earl of *Gloucester*, it was found that the Earl, on the day of his death, held in fee the manor of *Tewkesbury* with the appurtenances, of the King *in capite*, by knight's service. The inquisition enumerates the burgages, customary tenements, and other lands in the manor and borough of *Tewkesbury*, and the value of the rents and works, and the profits of the Courts Leet, and Borough Court, and many other particulars, usually belonging to a feudal lord in those times; and the value of the tolls of the borough is found to be 100*s*. and the value of the whole manor with the borough, 131*l*. 5*s*. 6*d*. This *Gilbert de Clare*, by his charter made in the 7 *Edw*. 2. (reciting that *William* and *Robert*, formerly Earls of *Gloucester* and *Hereford*, had for them and their heirs, by their charters granted and confirmed to the burgesses of *Tewkesbury* and their successors, the liberties therein mentioned,) granted and confirmed (among other things) to the said burgesses of the said borough, that they should have and hold their burgages by free service, at the rent of 1*s*. for a burgage: And that the same burgesses should be quit of toll and of custom within the lordships of the

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said Earl in the honor of *Gloucester*, and elsewhere in *England*, according to antient usage. The honor of *Gloucester* having afterwards become vested in the crown, *Edward* the Third, by a charter in the second year of his reign, containing an *Inspeximus* and recital of the charter of *Gilbert de Clare*, and particularly mentioning the said clause of exemption of toll and custom, did, for a fine made to him by the said burgesses, grant, for him and his heirs, that the same burgesses, and their heirs and successors, burgesses of the same town, might be quit for ever from toll, pavage, murage, pontage, passage, keyage, piscage, stickage, and stallage, and from all other such like customs, as well within the liberty of the said Earls, as elsewhere throughout all his kingdom. The market in *Tewkesbury*, and the tolls, have been sanctioned and confirmed by several antient charters of the following dates, viz. the 4th of *April* 1574, 17 *Eliz.*; and the 18th of *October*, 3 *Jac.* 1.: and on the 22d of *March*, 7 *Jac.* 1. the King, by charter of that date, in consideration of 2453*l.* 7*s.* 4*d.* granted to the bailiffs, burgesses, and commonalty of *Tewkesbury*, the manor and hundred of *Tewkesbury*, and divers messuages, rents, fines, &c. therein particularized, theretofore parcel of the possessions of Lord *Seymour*, attainted: also all markets, fairs, &c. within the borough, and all fairs, markets, stallage, toll, toll-custom, customs, pickage, &c. within the said borough, and the reversions and profits of tolls, toll-custom, customs, and subsidies of whatever beasts, cattle, things, and merchandizes, at whatsoever markets or fairs within the said borough sold or to be sold. Until about thirty or forty years back, all corn and grain was pitched in the market-house, or street adjoining, and sold in bulk. Since that period, a practice has gradually prevailed of selling in the market by sample; but in such case the customary toll of the corn has also till lately been taken by the Plaintiffs, when the corn

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corn has been delivered in *Tewkesbury*. On *Wednesday*, the 7th day of *January*, 1807, *the Defendant, knowing the Plaintiffs' claim of toll on corn or grain sold in their market, whether by sample or in bulk*, sold by sample to one *Joseph Buckle*, 45 bushels of beans, to be delivered in *Tewkesbury*. At the time of the sale, the beans so sold by the Defendant to *Buckle* had not been pitched in the market, or paid toll as if they had been pitched; afterwards, on the 14th day of *January* in the same year, these beans were delivered by the Defendant to *Buckle* in *Tewkesbury*. At the time of the delivery, and while the beans were in the waggon of the Defendant, the customary toll thereof was demanded of the Defendant by the proper officers of the corporation; but the Defendant refused to permit them to take the same. *Buckle* was at the time of this purchase, and continually since, seised and possessed of one of the antient burgage tenements, and paid the yearly rent of 1*s*. to the corporation. There was no ground of exemption of the beans in question from the toll, unless it was furnished by *Buckle* being such burgage tenant, and so far back as the memory of living witnesses went, no exemption had in fact ever been allowed to any person but a freeman of the borough. Neither the buyer nor the seller in this case was a freeman; all other persons, except freemen, had, as far back as the memory of living witnesses went, always paid the tolls; and the exemption from toll had never, as far back as those witnesses could remember, been claimed by or allowed to a burgage tenant. The question for the opinion of the court was, Whether the Plaintiffs were entitled to recover? If the Court should be of opinion that they were entitled to recover, the verdict was to stand: if not, a nonsuit was to be entered.

This case was twice most elaborately argued, first in

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Easter term 1809 by *Manley* Serjt. for the Plaintiffs, and *Best* Serjt. for the Defendant; and again in the present term by *Williams* Serjt. for the Plaintiffs, and *Shepherd* Serjt. for the Defendant.

Arguments for the Plaintiffs. It was resolved in *Ashby* v. *White*, 1 *Salk*. 19. 1 *Bro. P. C.* 45., that the right and remedy are convertibles, and that an action well lies for an injury to the right, though there be no actual damage. In the present case, however, an actual damage has been sustained. The Defendant acts injuriously in selling his corn by sample in the market; for although he takes advantage of the market to sell his goods, and although he knows that toll[a] is claimed for them, and although the toll indeed is equally due in respect thereof as if it were sold in bulk; yet as the corn is not in the market to be distrained, the Defendant is guilty of a fraud in selling them in such a manner as to deprive the Plaintiffs of the prompt remedy which they have for the toll, by taking it from the bulk when the bulk is brought into the market. The principle is well established, that a person shall not at the same time take the benefit of the market, and deprive the lord of his toll. And it is not necessary, in order to maintain the action, that the jury should find actual fraud in fact. But they have in fact found the Defendant guilty of a fraud, for he is guilty of the premises; that is, of the whole premises laid in the declaration, and the fraud is averred there. "If a man hath a market in one part of the "town of *D.* the inhabitants of another part cannot build "new houses; and there in their houses and shops sell "merchandizes; for this is to the damage of the mar-"ket. Admitted, 2 *Ed.* 2." 2 *Ro. Ab.* 123. C. pl. 1. The word fraudulently in the declaration does not import actual circumvention, but any act knowingly done,

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whereby injury accrues to another having an estate of freehold or other interest; and upon such an act the law implies fraud. This is not *damnum absque injuriâ*. It is distinguishable from the case of a mill, which the lord is bound to repair and the tenant to grind at, *Coryton* v. *Lytheby*, 1 *Saund.* 113., in this only, that there is no obligation on the seller to come to the market at all; but if he does come, he is bound and subject to all the rights of the persons having the tolls. So, if a person erects a market within seven miles of another, it is of itself a nuisance: it is not necessary to prove a special damage. 11 *H.* 6. 19. *B. The Prior of Dunstable's case*, which was not applicable to the circumstances in the case of *The Bailiffs of Tewkesbury* v. *Diston*, 6 *East*, 438., was this; the prior of *Dunstable* declared, according to the practice which then prevailed of pleading *ore tenus*, "that he was lord of the town of *Dunstable*, and that he had a market twice in the week, on *Tuesday* and *Saturday*, and that he and all his predecessors immemorially had the correction of the said market, and that it had immemorially been accustomed, that all butchers who sell their meat, or any other merchants which come to the said market with any other wares or merchandizes to sell, ought to sell it in the high streets of the same town, on the stalls of the prior, paying for every stall, on the day on which he hath the market, one penny; and that the Defendant is a butcher, and hath sold his meat on the market day, (shewing in certain how much,) within his own house, *secretly*, (*occultè*,) and hath also procured others to do likewise, whereby the prior hath lost the advantage of his stalls, and also the survey of the said market, to the injury and damage of the said prior." This is a plain and intelligible declaration, and a very good one. The Defendant pleads in bar to the action, "that he lives in a house in the town of *Dunstable*, and that all householders in the said town

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town have immemorially used to sell their wares and merchandizes every market day in their own houses, or where they please, and that the Defendant did so; and prays judgment of the action." *Cottesmore* C. J. determined, that the Defendant's prescription was not to the purpose, but was inconsistent with the right of the prior, which is bad. S. C. *Bro. Ab. Prescription pl.* 98. "For if the prior, he says, hath a market in the town, and is lord of the town, you cannot prescribe (i. e. generally) to sell meat in your own house on market days, for the market cannot be but in place overt; and the prior then loses the advantage of his market, if they sell their merchandizes in their houses; and inasmuch as he also hath the correction of the market, and to see whether the things which are there sold are lawful and fit to be sold, (the which cannot be assayed by his officers if they be not in open market, and he also loses his toll of the things sold,) therefore, since the market belongs to the prior, whom it behoveth that it shall be holden in the market place ordained for it, he (the Defendant) cannot keep the market in his own house, but in the common place on the market day," wherefore the Court disallowed the plea, and the Defendant craved leave to imparle; and afterwards, 11 *H.* 6. 25. *O.* amended his plea, and pleaded "that *Dunstable* was an ancient borough, and that there was an immemorial custom therein, that every burgess seised of a house therein, adjoining to the high-street, may sell on the market day all his wares and merchandizes *in the shops within the same house, abutting on and adjoining to the high street*, and that the officers of the prior have immemorially had the purview and correction of all things sold on the stalls of the prior, and that the Defendant was seised in fee of a house adjoining to the high-street, and there, in the said house, in a shop adjoining the high-street, sold his meat, as he lawfully might." The Plaintiff demurs to the insufficiency of the amended

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amended plea for two reasons: first, that it did not answer the allegation of the Defendant having procured others to do the same, upon which the Defendant again amends, by enlarging the averment of the custom, so as to include the selling by others within such shops; and secondly, the Plaintiff objects, that he had averred in his declaration that the Defendant had sold the meat in his house *occultè*, and that the Defendant's plea was no answer thereto. The Defendant, being unable to controvert the law, amends his plea again, by adding a traverse, "without this, that the Defendant sold the meat *secretly*, *occultè*, in his house, as the Plaintiff supposes," and the Plaintiff takes issue on the fact. It is a principle in pleading, that the traverse must be of the most material fact, the issue of which will decide the cause one way or the other. It therefore results from the Defendant's own pleadings, that if the act was done secretly, the Defendant was not within his custom, and the prior's general right must prevail; and the case establishes this principle, that if a lord of a market be entitled to toll, no one can come and sell in that market but in that particular way which will yield the toll to the lord; and that if he sells in a different manner from what he ought to do, the lord may maintain an action against the seller. In 6 *East*, 460. Lord *Ellenborough* C. J. was of the same opinion; for he says, "Assuming that a *seller*, (whose case is very different from that of a *buyer*,) would, under the circumstances, be liable to this species of action, as for a sale to the prejudice of the Plaintiff's market, does it follow as a consequence that the *buyer* would also be so? The seller has it in his choice whether he will sell by sample or not a commodity not then locally brought by him within the limits of the market where the sale takes place: but the buyer may have no such election: he cannot compel the farmer to bring his corn in bulk to the market; and if he be restrained

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from buying any corn but what is actually brought into the market, he may be entirely precluded from buying of corn, by the discontinuance of all resort to the market by persons dealing in that commodity in bulk: he may therefore be driven to the necessity of buying of corn in this way, or of wanting it altogether.

Secondly, The Defendant has shewn no exemption from toll. The grant to be quit of toll is a royal franchise; and if granted to a man and his heirs, it will descend first to his paternal, and on their failure, to his maternal heirs, like any other estate of inheritance. *Plowd.* 415. *last line.* But the immunity granted by *Gilbert de Clare*, is to his burgesses and their successors, not to his heirs: these words in a royal grant would of themselves create a corporation; and in the subsequent grant of *Ed.* 3. they clearly have that effect; and the immunity goes to the corporators, although the word heirs is there joined with successors. If it had been a grant of a like immunity to *Gilbert de Clare* and his heirs, *et tenentibus suis*, it would have had a different effect. The fine too was made to *Edw.* 3. by the burgesses, that is, in their corporate capacity: the case too finds that the toll has immemorially been paid by all except freemen, whereas these grants, 7 *Ed.* 2. and 11 *Ed.* 3. are long within the time of legal memory. But if the grant was to the burgage tenants, there is sufficient ground to presume either a forfeiture, a surrender, or an extinction of the immunity. The grant of 11 *Ed.* 3. would have been superfluous if the grantees were before free of tolls; therefore it must be presumed that they had, up to that time, paid toll, and Lord *Coke*, 2 *Inst.* 221. lays it down "that if the king, or any of his progenitors, have granted to any to be discharged of the toll of a market, either generally or specially, this grant is good to discharge him of all tolls to the king's own fairs or markets, and of the tolls, which, together with any fair or market,

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have been granted after such grant of discharge; but cannot discharge tolls formerly due to subjects, either by grant or prescription:" and since it is found that the toll has been immemorial, it follows that these grants of immunity made within time of memory must be void. For neither does it appear that *Gilbert de Clare* was ever lord of this market, so that he could grant the immunity, nor that the borough of *Tewkesbury* and market was parcel of the honour of *Gloucester*, any more than of the honour of *Hereford*, and that as such they came to the hands of the crown when the honour of *Gloucester* escheated; nor does it appear that it was not an independent manor; and from the circumstance found in the inquisition, that *Gilbert de Clare* died seised of the manor of *Tewkesbury* held of the crown *in capite*, the inference of law is, that it was an independent manor. [*Mansfield* C. J. At the time of the grant of *Gilbert de Clare*, he was entitled to grant this immunity; for it must be understood by this case, that he was lord of the market, though it is not expressly so stated; and if the doubt had been suggested at the trial, the jury would not have hesitated on the evidence of this inquisition to find, that he was such, as well as lord of the borough, and at the time of the grant of 11 *Ed.* 3. it must also be taken that the market was in the crown; for the case states, that the honour of *Gloucester* afterwards becoming vested in the crown, *Edward* the Third made a new grant to the burgesses of the same town, which infers that the grant was made in consequence of the honour so coming to the crown; and it must therefore be assumed that the manor and hundred of *Tewkesbury* was part of the honour of *Gloucester*.]

Arguments for the Defendant. No fraud has been especially found by the jury, nor does the case contain any facts on which the Court can fairly build an inference of fraud. And unless the jury had found that the Defendant

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Defendant sold in fraud of the market, the action cannot be maintained. The rule is laid down too largely, that upon every act of one man detrimental to another an action lies; the act done must be illegal. Where an act, in itself indifferent, becomes unlawful if done with a particular intent, the intent must be expressly found. *Rex* v. *Woodfall*, 5 *Burr*. 2667. And the act is not necessarily fraudulent unless the Plaintiff can shew that it was impossible it could be done for an honest purpose. Here the value of the toll, which is only one part in 170, is so small that it not only is possible that the corn might be sold by sample without any view to evade the toll, but it is difficult to conceive that such a minute fraction could in any degree influence the Defendant's choice of the mode of selling. There are other motives of much greater importance to influence the mode of sale. It would in fact be impracticable now to pitch and sell in bulk all the corn sold in many markets: *Mark-lane*, for instance, would not contain the hundredth part of what is there sold. The greater convenience of selling by sample, the saving of expence by not bringing the corn to market, and carrying it back if unsold, the greater facility of proportioning the supply to the demand, and thereby preventing the article from being depreciated in a glutted market, which very facility renders the average price of the corn ultimately lower to the consumer, as well as more commodious to the seller, are all considerations of incomparably greater weight, and must be presumed to have influenced the intent much rather than the fraudulent motive imputed; and unless the jury expressly find the fraud, the Court will not presume it. 10 *Co*. 56. which is a case of fraud in law. 2 *Lutw*. *Gwyn* v. *Poole*, 1560. *Blakey* v. *Dimsdale*, *Cowp*. 661. Lord *Mansfield*'s judgment. In the prior of *Dunstable*'s case, the question of fraud was expressly raised by the traverse. This is *damnum absque*

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injuriâ. *Ashby* v. *White* was the case of an unlawful act; but there is no unlawful act here. No case has been cited to shew that sale by sample is of itself unlawful; if it were, many districts in *England* would be wholly destitute of the means of purchasing corn. And with reference to the rights of the lord of a market, so long as the public convenience required that the corn should be pitched there in bulk, so long was the lord entitled to his toll; but his rights cannot be enlarged as the circumstances of the country vary; and so soon as the practice of selling it in bulk ceases, the lord's right to toll is gone. Where a seller takes the advantage of the land and the convenience afforded by the lord of the market, and eludes the toll, he may be subject to an action; but upon a sale by sample, neither the buyer nor the seller enjoys the same advantages as upon a sale in bulk. Anciently the only mode used was the selling the commodity in bulk. The advantages which it gave were, the immediate and positive transfer of the property by sale in market overt, the advantage of the testimony of the clerk of the market witnessing the sale, the correction of the lord of the market, to see that the quality of the goods was proper, and that the weight and measure were just. All these advantages are wanting in the sale by sample; in all these respects it is no better than a common private contract between one man and another. If two persons meet in a market, and conclude a sale of goods they have at home, without shewing a sample, it will not be contended that this is such a sale in the market by which the lord is defrauded of his toll. It is true that if one met another coming to the market with goods to sell, and should induce him to turn back, an action would lie. 2 *Saund.* 171. *Yard* v. *Ford*, S. C. 1 *Lev.* 296. An action lay; but that was where the Defendant, without even colour of a patent, erected a market, to the nuisance of the Plaintiff's market, for other men to sell their

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their goods, not to sell his own; but if a man opens a shop near a market, and sells goods therein, which he would otherwise have brought to the market, or if in his way to the market with goods, he stops short and makes a contract for them, neither act is any injury to the market. Is it to be contended that if a factor sells by sample in *Mark-lane* a thousand quarters of corn now in *Riga*, to be delivered in *Gibraltar*, that toll is due for it in *Mark-lane*. It would be equally reasonable to hold that an action lies against a man for not bringing his goods into the market, or for making a private contract in the market place, as to say that he may not make a private contract there, exhibiting a sample at the same time. The acts here supposed are not like the prior of *Dunstable*'s case. It appears that the Defendant there had procured others to come and sell in his shop, not in their own houses, for the Court answers to his first plea, "you cannot prescribe to sell meat in your own house on market days, for the market cannot be but in place overt;" and afterwards, "the market must be "holden in the market place ordained for it; he cannot "hold market in his own house, but in the common "place on the market day;" so that the case in that point of view amounts to no more than that of *Yard* v. *Ford*. But it may also be admitted that the traverse on the word *occultè* was material, because the plea there does not deny that toll was due to the prior for goods so sold in shops, and the secrecy of the sale prevented his collecting it. In the case of *Dorking* market, tried before *Heath* J. a man had fitted up an inner room in a public-house, and corn was pitched and sold there; and the Plaintiff recovered against him on the same ground as in the prior of *Dunstable*'s case, because it was done secretly. A principle may be extracted from the case of the bailiffs of *Tewkesbury* v. *Diston* rather in favour of the Defendant; for it may with equal justice be said, that if

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if a buyer would not buy except in the market, the seller would bring his goods to market, because he could not sell elsewhere: but by law every man is at liberty to bring his goods to market or not, provided he does not conspire with others, so as to prevent their attending the market.

Secondly, as to the exemption.—Toll is not incident to a market, it must be created by grant; and though it is now due to the corporation of *Tewkesbury*, it does not follow that it was due to the lord of the market from the burgesses before the grant of 7 *Ed. 2.* That grant indeed recognizes a then subsisting immunity; for it *confirms* to the burgesses of the borough to be quit of toll and of custom, *according to ancient usage.* If that is to be construed as immemorial usage, then the burgesses never were subject to toll at all; and to whomsoever, and by whomsoever these tolls were originally granted, they were granted not payable by the burgesses of *Tewkesbury*. For although long continued usage is a ground to support a prescription for toll, yet, if a time can be shewn when toll was not paid, it will destroy the prescription. The words "according to ancient usage" do not imply that the privileges granted are merely *commensurate* with ancient usage, and the grantor, at the same time that he granted by this charter some new immunities, clearly recognized that others subsisted by ancient usage. If a forfeiture had been committed, these words would have limited his right, and he could have resumed only what he had so granted; he could not have determined the earlier exemptions, nor entitled himself to more toll than he had before this charter. [*Heath* J. observed that anciently the kings used to renew all the corporate charters at the beginning of their reigns, and receive a fine for them. *Madox firma burgi.*] Although the crown cannot grant away or extinguish the previously granted rights

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rights of a subject, it may release its own subsisting tolls, and every lord of a market may do the same. The burgesses to whom this exception is granted, are the same burgesses to whom *Gilbert de Clare* had granted his burgage tenements at a shilling rent, the burgage tenants. [*Mansfield* C. J. It probably happened in this corporation as in many others, that the first members were the holders of the burgage tenements; and therefore so long as burgage tenants were elected they would enjoy the immunity, but when they ceased to be elected, the rights of the burgage tenants not elected would from that time also cease.] When the honour of *Gloucester* came to the crown, nothing could come with it but that which had remained with *Gilbert de Clare;* and if the tenants were rendered free by his charter, the re-union of the honour with the crown would vest in the crown only the tolls which that nobleman had, not those which he had not. And if the burgage tenants were free before, the charter of 11 *Ed.* 3., granting an exemption to the burgesses and their successors, could not derogate from their rights; the only consequence is, that the grant operates nothing. It is suggested that the exemption might be forfeited; but it could not be forfeited by the act of a majority, it could only be forfeited by the acts of all the individuals. If, however, there were certain tolls from which *de Clare's* charter did not exempt the burgage tenants, it is for the Plaintiffs to shew by evidence what were the particular exceptions.

Arguments in reply.—It is clear the first charter was a grant to the burgesses in their corporate capacity, and not to the burgage tenants in right of their tenures. The contrary is not to be inferred from their being called by a name derived from their tenures; they were so called because burgesses, in those days, were not so much distinguished from strangers by any other circumstance, as by

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by the certainty of their service due in respect of their burgage tenements; but to make the exemption descend to their heirs, it must be granted to them and their heirs. Again, although 100*s*. are found to be the value of the toll of the borough, the Earl of *Gloucester* might hold it in farm of the crown, and may have granted an exemption which it was not his to bestow. Neither could King *Edward* the Third grant an effectual exemption throughout all *England*, but only in such places where he had the lordships. Supposing, however, that *Gilbert de Clare* was entitled to these tolls, and that he made a valid grant to the burgage tenants, yet the case finds, that on the attainder of Lord *Seymour*, the manor became vested in the crown; upon that re-union, the toll, which is a royal franchise, became extinct by unity of possession; and the immunity, which had been previously granted out of it, became extinct also. 43 *Ass. pl.* 10. *Palm.* 82. [*Heath* J. The attainder and unity of possession could not affect the rights of the burgesses. *Mansfield* C. J. The new grant by *James* the First could only operate to pass the market such as it was before the attainder; the crown could not re-grant the toll, free from any exemptions which then existed. *Lawrence* J. If the lord of a manor grant away part of his rights to his tenants, his subsequent crime, forfeiting the rest, cannot revoke his prior grant. It might as well be said that if the lord of a manor release to his tenants all his services, his attainder will revive them.] There is at least good cause arising from the perpetual disuse, for the Court to presume, either that the burgage tenants had by some act forfeited their franchise, or otherwise that it has been surrendered by the individual tenants who were entitled to it, since it has never been allowed, and these charters have never before been brought forward or known to exist, *et de non apparentibus et non existentibus eadem est lex;* or that it has been extinguished by unity of possession. As to the merits,

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merits, the reason why no adjudged case is to be found, is, that the sellers by sample, in order to quiet the lords of the markets, on the first introduction of sale by sample, have generally paid the toll. The prior of *Dunstable*'s case can be supported only on this ground, that if the Defendant, who had a house adjacent to the market, did not sell in it according to the custom of the borough, he was bound to come to the market, and sell at the prior's stalls; and that by his selling otherwise, the prior was deprived of that toll which he would have had if the meat had been sold at his stall: that case is not in principle distinguishable from this. If on a sale by sample, neither buyer nor seller enjoys all the advantages of the market, it is the fault of the seller, who may pitch his corn if he will; and although he chooses to waive the right, he cannot thereby lawfully deprive the lord of his toll.

The Court observed that the case had been argued in a masterly manner, and took time to consider of their judgment, which was on this day pronounced by

MANSFIELD C. J. This in effect is an action brought against the Defendant for selling corn in the market of *Tewkesbury* by sample, which is alleged in the declaration to be done fraudulently, and injuriously to the Plaintiffs; that is, not fraudulently, according to the common sense of the word, but only fraudulently because injuriously, as depriving the Plaintiffs of a toll to which they are entitled. The Chief Justice here referred to the material parts of the declaration. The first question which arises on this case is, whether the selling by sample in the market is an injury to, or a fraud on, the persons who have a right to toll on goods sold in the market. The second is, whether, supposing the Plaintiffs have such a right in general, they have such a right against persons claim-

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ing, in the manner here stated, to be exempt from payment of the toll. As to the first point, it is very extraordinary that no cases are found to have been decided on the question; for neither have any of the counsel in the cause mentioned such, nor has any such occurred to the Court. Considering that the origin of markets is by grant from the king, or prescription, which prescription supposes a grant, a lord of a market must necessarily have a right of action against any person who injuriously deprives him of toll accruing in that market. That being so, then comes the question on the sale by sample; which mode of sale, though certainly not very recent in *Tewkesbury*, nor in many other towns, is comparatively modern. It has now in a great measure superseded the ancient practice; but anciently, when the communication throughout the country was more rare and difficult, it was a great convenience both to the buyer and seller to have a common place of meeting, to barter and sell their goods; and even now it certainly is to a degree a convenience; but at the same time it operates as a tax on the commodity, by enhancing the price, and by the restriction which is imposed on the operations of trade, if persons may not buy or sell but in that market. One question is, whether they who sell by sample have any benefit from the market; and it is said, that if they could not sell by sample, but were compelled to pitch their corn in bulk, they would not go there at all, but would sell at their own houses; and that therefore the market is not beneficial to them; but on the other hand they have a benefit from frequenting the market, for they find there customers, persons ready to buy; therefore by going to the market, they have the benefit of the market. If so, then the lord of the market ought not to be deprived of the benefit of the toll which is his due for goods sold by persons taking the benefit of the market. And the prior of *Dunstable*'s case is a very strong

authority

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authority that a person taking the benefit of a fair shall pay the duties of it; and consequently, to persons taking advantage of a market, and selling there by sample, the principle of that case strongly applies. The circumstances of that case are quite immaterial, but the principle thereby established is, that where a person does any thing injurious to the right of a market, the lord of the market shall have an action. In *Mosely* v. *Pierson*, 4 *T. R.* 104. Lord *Kenyon* C. J. held it a clear fraud on a market to sell goods by sample therein. He says, "If the Plaintiff's demand had arisen on contracts of "sale by sample, he would have brought a different "kind of action: an action for the fraud in not bringing "the goods into the market:" he refers to no authority, but states it as a clear principle in his mind, that if a person sold by sample in the market, it would give an action, as for an injury to the market. Upon this ground then we are of opinion that the present action well lies, unless the Defendant brings himself within the exception. (Here the Chief Justice read that part of the case which states the charter of *Gilbert de Clare*, and observed that a great deal of evidence was stated there which might better have been omitted, and that facts to be thereupon found by the jury, might more properly have been substituted.) The words "*according* "*to ancient usage*," are certainly very important, and on the one side have been relied on as affording an argument that the exemption contended for, was pre-existing by ancient usage; but they afford a very strong inference on the other side also, that it may be a grant of no other exemptions than the burgesses anciently used, and so may be no grant of exemption at all: and it is very remarkable, that the charter speaks not of tolls in *Tewkesbury*, but in the honour of *Gloucester*, and throughout all *England*; and further, it is not in respect of their burgage estates; for in the first charter it is not granted to the

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the burgesses and their *heirs*, but to the burgesses and their *successors*. Then the later grant by *Edward* the Third, is to the burgesses their heirs and successors, to be free of all toll, pavage, murage, pontage, passage, with other general words. Now one of those words, heirs and successors, must be improper; the first, if the grant be to a corporation, and the second, if the grant be to the burgage tenants. But it is observable that this last is not a grant of an exemption from toll in any particular market, and least of all in the market of *Tewkesbury*. Then comes the charter of *Elizabeth*, and the charter of *Jac.* 1. whereby *Jac.* 1. granted to the bailiffs and burgesses of *Tewkesbury* the manor and hundred of *Tewkesbury*, and all fairs, markets, stallage, toll, toll-custom, customs, pickage, &c., and the reversions and profits. The case then states, that for 40 years past a practice has gradually prevailed of selling in the market by sample, and that the corporation has received toll when the corn has been delivered in *Tewkesbury*: that the Defendant knowing the Plaintiffs' claim of toll upon corn and grain sold in their market, whether by sample or in bulk, sold by sample to one *Buckle*, 45 bushels of beans, to be delivered in *Tewkesbury*, which had not been pitched in the market, or paid toll, and that the Defendant refused to pay toll; that *Buckle* was at that time seised and possessed of a yearly burgage tenement, and paid 1*s.* burgage rent to the corporation; and it is further stated that there was no ground of exemption, except that *Buckle* was seised of a burgage tenement; and that no exemption had ever been remembered to be allowed to any but the freemen of the borough. The question then is, whether on these charters and facts together an exemption is made out for a person having no other claim than as the proprietor of a burgage tenement; and the charters are so general and so loose, that they ought to be expounded by that usage, which has immemorially prevailed.

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prevailed. The charter of *Gilbert de Clare* might have exempted burgage tenants from the tolls of the market, but it does not appear that it did so; and from time immemorial no such exemption has been allowed to burgage tenants. As to the word successors, it applies to what is usually understood to be a corporation; and to the members of the corporation the usage has always applied it. The charters then being such as they are, and the usage invariable to exempt the members of the corporation, and no others, we are of opinion, that the judgment must be for the corporation.

Judgment for the Plaintiffs.

ROWNTREE v. JACOB.

June 21.

In an action for money had and received, if the Defendant shew a deed of assignment of the money to himself, and a receipt for the consideration money indorsed, it is a good discharge, though there are pregnant evidences of suspicion that the consideration is falsely recited, and that the money never was paid.

If there has been an imposition in obtaining the deed, the only relief is in equity.

THIS was an action brought by the Plaintiff, who had been the acting boatswain of a man of war, and therefore was admitted by *Lens* Serjt. to be a warrant officer, and not within the protection of the stat. 26 *Geo.* 3. *c.* 63. *s.* 1. against the Defendant, who was a Jew, and an agent for prize-money and seamen's wages, residing at *Portsmouth*, to recover a sum of money for wages and allowances, which had been paid by the officers of government into the hands of the Defendant, for the use of the Plaintiff. Upon the trial of this cause at the *Westminster* sittings after last *Hilary* term, before *Mansfield* C. J. the Plaintiff proved that 103*l.* had been paid to the Defendant; but the Defendant produced a power of attorney, not made revocable, and a deed of assignment to himself of the whole of the Plaintiff's pay, which purported to have been made "in consideration of 100*l.* 12*s.* in hand paid "at or before the delivery thereof;" and on the back was indorsed a receipt signed by the Plaintiff, and purporting that he had "received the within mentioned sum of 100*l.* "12*s.* on the day and year aforesaid." The attesting witness.

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ness, who was a clerk to an attorney employed by the Defendant, swore that he prepared the assignment, that he took the sum to be inserted as the consideration, from the Defendant's relation: but that he read over the assignment and receipt to the Plaintiff before it was executed, and that the plaintiff acknowledged it to be right. There was also evidence that the Plaintiff had acknowledged the receipt of 15*l.* paid him by the Defendant; but on cross-examination it appeared, that neither the plaintiff, who was an illiterate man, nor the Defendant, had kept any account, or given or taken any vouchers whatever of the monies received or advanced by the Defendant during any part of his agency; that no account whatsoever was stated at the time of executing the assignment, nor did any money pass. Nor did the Defendant avail himself of the opportunity to clear up these circumstances, which was given him, by notice requiring him to produce his own books at the trial. It also incidentally appeared, that the conduct of the Plaintiff in his expenditure was marked with thoughtless extravagance, and total ignorance of business. *Lens* Serjt. for the Defendant relied on the circumstances of the whole case, and particularly on that of no money having passed at the execution of the deed, as the indorsed receipt, according to his interpretation, purported to express, as a proof that the whole was a gross fraud, and that the Plaintiff was entitled to recover: the jury however relied on the sailor's signature to the receipt, and found a verdict for the Defendant.

Lens in the following term having obtained a rule *nisi* for a new trial,

Heywood Serjt. shewed cause. The only question that could be properly discussed at the trial, was the execution of the assignment. It was immaterial to go into evidence of the consideration for it; the deed would have been good even if there had been no consideration; for a deed imports a consideration; and, as the jury properly observed, if a deed

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deed and a receipt will not discharge an accountant, no man can be safe. Besides, the receipt does not express that the money was paid at the time of execution only; it refers to the time mentioned in the deed, and that is in the alternative, "*at or before* the execution." If this is a badge of fraud, almost every conveyance is fraudulent, as in the cases where a part of the price is deposited at the time of an auction, or some of the parties live at a distance, and cannot all execute at the same moment. In the case of mortgages the money may be advanced at several times, yet is always recited to be paid in one day: but if the Plaintiff had in reality received the sum of 15*l.* only, still if he had the intention of assigning the whole, the assignment would be good in law: if any imposition had been practised, the relief would be in equity; the present verdict therefore must stand.

Lens contrà. It is not immaterial what was the consideration; for the question is not whether a deed is good without consideration, but whether a deed is good which falsely states the consideration. The nature of the case does not admit of direct evidence to prove the non-payment; for a negative cannot be proved; therefore, notwithstanding the assignment, when the payment was contested, the *onus probandi* still rested on the Defendant to shew the application of the sums he had received.

HEATH J. observed, that where a man by deed acknowledges himself to be satisfied, it is a good bar, without receiving any thing.

Cur. adv. vult.

MANSFIELD C. J. I still have great doubts on my mind, which perhaps has been biassed by my practice in courts of equity. This is an action for money had and received: a power of attorney is given, reciting the consideration to be money paid at or before the execution of the deed. It was proved

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proved that the deed was read over to the sailor, and that he said all was right; on the back of it was a receipt for the money, as having been paid on the day and year aforesaid: it is the same form of receipt which is indorsed on every deed and mortgage, although the money is not paid on the day of execution. My brothers are all of opinion that a verdict could not stand, if obtained, against the evidence of that deed and receipt, and consequently the verdict already found according to the legal operation of those instruments, must be supported, and the rule must be Discharged

END OF TRINITY TERM.

CASES

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ARGUED AND DETERMINED

IN THE

COURTS OF COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Michaelmas AND Hilary Terms,

In the Fiftieth Year of the Reign of GEORGE III.

KIRTLAND *v.* POUNSETT. *Nov.* 7.

If a purchaser take possession of premises under a contract of sale, which, on account of a defect in the vendor's title, fails to be completed, the vendor cannot afterwards recover rent for the period of the purchaser's possession, upon an implied contract for use and occupation.

At least he cannot, if the purchaser had paid the whole purchase money when he entered, and the vendor had kept it during the purchaser's possession.

INDEBITATUS assumpsit for the use and occupation of a house, and of certain fixtures therein. At the trial of this cause at the *Middlesex* sittings after last *Trinity* term, before *Mansfield* C. J., it appeared that the Defendant had, in *July* 1807, contracted to purchase of the Plaintiff his lease of this house for 700*l.*, and had immediately paid him a deposit of 150*l.* in part of the purchase money. Being solicitous to obtain immediate possession,

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possession, he soon afterwards paid the residue of the price, upon which inducement the Plaintiff permitted him to enter and occupy the premises. In the month of *October*, the Plaintiff not having made out a good title, the Defendant declared that he rescinded the contract; he accordingly quitted the possession of the premises, and brought an action for money had and received, under which he received back from the Plaintiff the whole purchase money, and the expences of investigating the title. The Plaintiff then commenced this action to recover rent for the space of time during which the Defendant had occupied the premises. *Best* Serjt. and *Selwyn*, for the Defendant, contended that there was no contract either express or implied in this case; that the statute which gives the action for use and occupation, requires that some contract of demise should subsist, and that the contract of sale, which was proved, by sufficiently accounting for the possession of the premises, disaffirmed the existence of any other implied contract. They urged that in the case of *Hearne* v. *Tomlins*, *Peake N. P. Cases* 192. Lord *Kenyon* C. J. had decided that on a purchase being defeated by the want of a title, nothing could be recovered by the vendor in this form of action. *Espinasse*, *contrà*, observed that Lord *Kenyon* limited that position to the case where the occupation of the house "was not beneficial." *Mansfield* C. J. at first inclined to think that the action might be supported; for that if a man had contracted for the purchase of an estate, of the annual value of many thousand pounds, and had, through the imprudence of the vendor, been permitted to take possession, which he might possibly retain for several years, pending a discussion of the validity of the title in a court of equity, it would be strange if the purchaser could hold the possession and receive the profits during all that time, without paying any consideration

for

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for it to the vendor. But upon the ground that during all the Defendant's occupation of the premises the Plaintiff had been in possession of the purchase-money, of which he had made, or might have made interest, the Chief Justice directed a nonsuit, with liberty for the Plaintiff to move that it might be set aside, and a verdict entered for the Plaintiff with 8*l.* 1*s.* 2½*d.* damages, being the amount of the difference, by which the jury found the reasonable value of the house during the Defendant's occupation, to exceed the interest of the purchase-money, being computed for the time during which the money was in the Defendant's possession.

Accordingly *Shepherd* Serjt. on this day moved for a rule *nisi*, contending, that where a purchaser is let into possession in pursuance of a contract, if that contract is rescinded, and the parties are remitted to their original situation, an undertaking to pay rent for the time of the possession arises by implication of law: he endeavoured to distinguish this from the case of *Hearne* v. *Tomlins*, because in that case the Plaintiff had sustained a loss by having taken possession.

MANSFIELD C. J. I doubted extremely whether in any view of the case the Plaintiff could recover for the occupation of the house; if no money had been paid, perhaps it might be a different question: but if a man pays part of his money, and is so unwise as to take possession without a title, is it not just that the one party should take back his money, and the other take back his house? It is impossible to make the rules of law depend on the balance of loss or gain in each transaction. The possession of a house is always beneficial; for it protects the occupier from the inclemency of the weather. A contract cannot arise by implication of law under circumstances, the oc-

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currence of which neither of the parties ever had in their contemplation.

The Court unanimously held that the nonsuit was right, and

Refused the Rule.

Nov. 9.

HEGAN *v.* JOHNSON.

If, under an agreement for a lease at a certain rent, the tenant is let into possession before lease executed, the lessor cannot, during the first year distrain for rent.

For there is no demise, express or implied.

REPLEVIN. Because the Plaintiff for three-quarters of a year, ending on the 29th *September* 1808, had held the house in which, &c. as tenant thereof to *George Ross, by virtue of a certain demise to the Plaintiff theretofore made*, at a certain yearly rent of 40*l.* payable quarterly, and because 30*l.* rent for the said space of three quarters of a year, ending on the said 29th day of *September*, was in arrear, the Defendant made cognizance as bailiff of *Ross*. Upon the trial of this cause at the *Croydon* Summer Assizes 1809, before Lord *Ellenborough* C. J., it appeared that the Plaintiff held the premises under an agreement, whereby *Ross* agreed "that he would by indenture demise to the Plaintiff the house then in his occupation, for the term of 14 years from the 25th day of *December* then last past, (determinable as thereinafter mentioned,) at the yearly rent of 40*l.*, payable quarterly, clear of all taxes, (except land-tax); but if the Plaintiff should pay to *Ross* the sum of 40*l.* before the expiration of the first quarter, which should be at *Lady-day* then next, in that case the rent should be reduced to the rate of 33*l.* *per annum*, payable quarterly." The Plaintiff had been in possession three quarters of a year. The jury, under his Lordship's direction, who thought this instrument

ment was no demise, and did not support the cognizance, found a verdict for the Plaintiff.

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Best Serjt. now moved to set aside this verdict, and enter a verdict for the Defendant. The Plaintiff was in possession, and since he was not a trespasser, he was a tenant, and there was a demise; the word demise is rendered necessary in the cognizance by the statute 11 *G.* 2. *c.* 19. *s.* 22. Although this agreement would not have proved a demise, yet it was evidence of the terms on which the demise subsisted. Under every agreement of this nature, the occupier becomes tenant from year to year, and cannot be ejected without notice to quit: it would therefore be highly mischievous if the landlord could not distrain.

The Court asked, whether he could distrain at all under such an agreement? The occupier certainly did not become tenant from year to year at the beginning of the first month or first three months: for clearly at any time before the end of the first year, if a lease had been tendered to the occupier, and he had refused to execute it, the lessor might have ejected him without any notice to quit, and if he had executed it, he would thenceforth have held, not under the supposed demise, but under the lease. When a person is so foolish as to enter upon the premises under an agreement for a lease, without a stipulation that in case no lease is executed, he shall hold for one year certain, if he does not execute, the landlord may turn him out without notice. The effect is, that the lessor cannot distrain for the rent: he must bring his action.

Rule refused.

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Nov. 13.

PRINGLE v. TAYLOR.

If a party entitled under a contract to receive a profit from another, by his own act so confounds the measure of that which he was to receive, that it can be no longer ascertained, he vacates his whole claim.

A. agreed to find sufficient coals for *B.*'s engine, to draw water from *A.*'s mine, and *B.*'s little coal, *as they then stood. B.* sunk to a lower seam, in draining which, he drained the other two seams but consumed for his engine more coal than before. Held that *A.* was no longer bound to furnish *any* coal because *B.* had destroyed the measure of sufficiency.

ASSUMPSIT. The Plaintiff assigned a breach by the Defendant, in not supplying the Plaintiff with small coal for the use of his engine, according to the terms of the agreement hereinafter stated: at the trial of this cause before *Wood* B. at the *Northumberland* assizes, 1808, the jury found a verdict for the Plaintiff, with 40*l.* 15*s.* damages, subject to be changed for a nonsuit, according as the opinion of the Court should be, upon the following case:

The Plaintiff was possessed of a seam of coal, called the little coal of *Beadnell*, in the county of *Northumberland*, and of a steam engine, which was originally used by him for drawing off water therefrom; the Defendant was possessed of a seam of coal contiguous to, and nearly upon a level with the Plaintiff's, but had no steam-engine for drawing the water therefrom. It was necessary to draw the water from these collieries before they could be worked; and the Defendant, before the making of the agreement, was not able to work his coal, except at such times when the engine of the Plaintiff had been worked long enough to draw the water from the Defendant's as well as the Plaintiff's coal. Upon the 22d of *December*, 1806, the following agreement was written and signed by the Defendant, in the shape of a letter addressed to the Plaintiff: "I hereby agree to give you small *coals* "*for your engine, to draw your water from your little coal* "*and my coal, as they now stand*, on condition you keep "your engine *where she now stands*, and a person to attend her; you defraying every other expence that necessarily attends such.—The above conditions to commence from this day to the 12th *November*, 1807." The Plaintiff

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Plaintiff acceded to the terms proposed, and from the making of the agreement to the 12th of *November*, 1807, regularly kept a person to attend the engine, and kept it at work in the same place, so as effectually to draw the water from the Defendant's coal, and defrayed every expence attending the engine, except the coal. The Defendant, from the making of the agreement to the 3d of *June*, 1807, regularly supplied the engine with coal according to the contract: the Plaintiff a little before that time ceased altogether from working his little coal, and opened and worked a seam called the main coal, which lay much deeper than either the Defendant's coal, or the Plaintiff's little coal, and by the sale of such main coal entered into a competition with the Defendant, which the Defendant deemed prejudicial to his own interest in the market. The Defendant from that time refused to supply any more coal for the engine. From the 3d *June* to the 12th of *November*, 1807, the Plaintiff supplied the engine, at his own expence, with the whole of the coal necessary to relieve the Defendant's coal from water, and did thereby relieve the Defendant's coal from water, by keeping the water at a level low enough for the working of his own main coal. The verdict was taken for the value of so much coal as upon a fair calculation would have been necessary to keep the engine so long at work, as would have been requisite for the mere purpose of keeping the Defendant's coal and the little coal free from water.

Best Serjt. for the Plaintiff. The Defendant assigns as a reason for refusing to furnish coal, that the Plaintiff has opened another coal-mine, and created a competition against him in the market. But this is an injury which cannot be complained of in any court of justice. The only ground he could make to excuse the performance of his contract, would be the non-performance of the

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Plaintiff's part. He does not, however, allege that; but objects that it is performed for another purpose than for the drying the Plaintiff's little coal mine. It is true that the immediate purpose is to drain a seam of coal which lies lower; but the Plaintiff, therefore, must of necessity drain the upper vein also, and he has a continuing interest in the upper vein. The true construction of the agreement is, that while the engine stands in the same place, and the Plaintiff thereby dries the Defendant's coal, the Plaintiff is entitled to so much small coal as is sufficient to dry it. If in *June* the Plaintiff had ceased to work the engine altogether, the Defendant might have sued him. It therefore is reciprocal, that the Defendant should be obliged to furnish coals till the 12th of *November*, 1807, whether he wrought for his new vein or his old one. The Plaintiff does not contend that he is entitled to demand the greater quantity of coals necessary to draw the water from his lowest mine; and it appears specially on the case, that the jury have not given damages for that quantity, but only for the quantity sufficient to draw the water from the level agreed on. Therefore, no injustice is done by the verdict, and it ought to stand.

Williams Serjt. for the Defendant. If the agreement had been, as it is supposed to be, that if the Plaintiff should with his engine draw off the water from the Defendant's mine, the Defendant would give him a definite quantity of coal to supply the engine, the argument of the Plaintiff would be good. But the Defendant was not so imprudent as to make this agreement, and he has made a very different one; it is for coal to draw the water from your little coal and my coal, as they now stand. If this relative state had continued, and the Defendant had refused to supply coal, the action had well lain. But it is material that the case states that the

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Plaintiff had ceased altogether to work the little coal, and had opened the main coal. This alone would have determined the matter; but the case goes further: for it states that the level of the main coal is much deeper, and that the verdict is calculated on that proportion of the whole coal now necessary, which would have been requisite to drain the little vein only. This shews, then, that the verdict is wrong: there was no calculation in the original agreement: it was to find coal for drying the little coal, while that continued to be wrought: as soon as the Plaintiff opened the main coal, he should have come to a new agreement; for the old one was at an end.

Best, in reply. It is material, that this is not an agreement to last so long as both mines should be wrought, but down to a limited time, the 12th *November*, 1807. But it is said the terms so restrict the agreement, that it is to stand no longer than whilst the little coal continues in the same state. But the terms of it are to be taken most strongly against the Defendant who pens it; and it therefore still subsists; for the circumstance on which it was to determine was an alteration in the state of one of the then existing mines, not the digging a new one; and those two mines remain in the same state; their levels and the position of the engine are unaltered. Nothing in the agreement restricts the Plaintiff from opening other mines than the little coal, or from using the engine to draw the water from other mines besides the Defendant's. Here it appears the Plaintiff has in a given part of the day exhausted all the water of the Defendant's mine, and employed the residue of his force in drying another vein of his own. It is admitted the Defendant has had all the advantage he could promise himself under the contract; he therefore ought to pay for it: if the Defendant had thought there were circumstances

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to determine the contract, he ought to have given notice; but he lies by.

MANSFIELD C. J. This action is brought for not supplying small coal for the working of an engine to draw water from the mines in the Plaintiff's occupation: the declaration states, that in consideration that the Plaintiff would keep his said engine where the same then stood, from the 22d day of *November* 1806, until the 12th day of *November*, 1807, and would during that time keep a person to attend the same, and would defray every other expence that necessarily would attend such keeping of the said engine, the Defendant undertook that he would during the time aforesaid give the Plaintiff small coals for the said engine to draw the water from the Plaintiff's *said little coal mine*, and from the coal mine of the Defendant, *as they then stood*. So the Plaintiff himself states, in his first count, that it was to draw water only from his little coal and the Defendant's mine, and for no other purpose. This agreement is proved by a letter, which in fact puts an end to the case. Now what is the letter? I hereby agree to give you small coals for your engine, to draw water from your little coal and my coal, as they now stand. The word "they," can only refer to "your little coal and my coal," and "now stand" must be interpreted, with reference to the subject matter, to mean, that so long as the operations of draining which the Plaintiff necessarily performed in the pursuit of his own works, were insufficient to keep the Defendant's coal dry, unless additional labour was bestowed for that purpose, so long would the Defendant supply the engine with coals; and as long as the Plaintiff worked only to get his little coal, the Defendant did supply him with coal. The Plaintiff thought it more advantageous to go to the main seam, which lay much deeper, and therefore required

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required more power to drain it. The Defendant says, I will supply you with coal no longer: it is urged that a notice was necessary; but surely it was not necessary to give the Plaintiff notice of that which the Plaintiff himself did: the Defendant however refused to supply him, and very rationally; for what possible measure could be taken, to ascertain what coal was necessary to be supplied. A new calculation might be required every day and every week. It would be an everlasting ground of dispute; and who was to decide it? The contract therefore was then at an end.

HEATH J. I am of the same opinion. The true construction is, that the engine should be worked for draining the mines as they then stood; that is, while they continued in the same train of working: therefore as soon as the Plaintiff began to work a deeper seam, things were altered.

LAWRENCE J. concurred.

CHAMBRE J. The case is rendered somewhat obscure by what was stated concerning the competition in the market, which has nothing to do with the subject. The Plaintiff has rendered the bargain totally uncertain, by altering the state of the circumstances. He has vacated the contract, by rendering it impossible to know what is the measure of sufficiency. The measure may vary every day, or every week, and a new arbitration or action must as often take place.

Postea to the Defendant.

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Nov. 15.

Hawke v. Bacon.

Twenty years adverse possession of a waste inclosed, is a bar to the entry of a commoner.

If it is alleged that a close called *A.* has been separated and inclosed from a waste for 20 years, to support the allegation, it is necessary to prove that every part of the close has been so long inclosed.

Upon a plea of *liberum tenementum*, the Defendant has the choice to what parcels he will apply his plea, and if the Plaintiff insists on a trespass in other parcels, he must newly assign.

An encroachment does not cease within 60 years to be part of the waste.

TRESPASS for breaking and entering the Plaintiff's close, called, *Far End Close*, treading the grass, and pulling down the walls and fences. Plea 1. Not guilty. 2. That the close in which, &c. then was, and immemorially had been, parcel of a certain waste called *Ughill Moor*, and not separated or divided therefrom, except as thereinafter was mentioned; and that the Earl of *Fitzwilliam* was seised in fee of a certain messuage and one hundred acres of land, in right of which he prescribed for common of pasture in and throughout the said waste, whereof the close in which, &c. was parcel, &c. for all his commonable cattle levant and couchant upon the said messuage and land, as thereto appertaining; and that the Earl demised the said messuage and land to the Defendant, who entered and was possessed. And because the walls and fences in the declaration mentioned at the several times when, &c. were wrongfully erected and standing in and upon the said waste, whereof, &c. and separated and divided the same close in which, parcel, &c. from the residue of the said waste, insomuch that the Defendant without somewhat pulling down the walls and fences, could not fully use his common of pasture, he justified entering the close in which, &c. parcel, &c. and pulling down the said walls and fences so there erected, in order that he might use his common; whereby he abated and removed the aforesaid inclosure, and reopened the close in which, parcel, &c. to the residue of the waste, as he lawfully might.

The Plaintiff joined issue on the first plea, and for replication to the second plea, denying by protestation that the close in which, &c. was parcel of *Ughill Moor*, the seisin of the Earl of *Fitzwilliam* in the said messuage, and the

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the prescription for common of pasture in and throughout the said waste, whereof the said close in which, &c. was parcel, pleaded, that the Plaintiff's close in the declaration mentioned was a close called *Far End Close*, and that the same close in which, &c. continually for twenty years and more, before and at the first time when, &c. had been, and was separated, divided, and inclosed from the said waste called *Ughill Moor*, and occupied and enjoyed in severalty, and adversely to the said Earl, and to all those whose estate he had in the said messuage and land, and to his and their tenants, and to all persons claiming by, from or under him, them, or any of them, and without the exercise or enjoyment of the said supposed common of pasture, and without any entry thereon made for or relating to the said supposed common. The Defendant protesting that the replication was not sufficient in law, and that the close in which, &c. still was parcel of the waste for the purposes therein mentioned, rejoined that the part of the close whereon the walls and fences at the several times when, &c. were standing; had been and was wrongfully separated and divided from the residue of the waste within 20 years next before the first time when, &c.; wherefore he, the Defendant, entered that part of the close in which, &c. parcel, &c. at the several times when, &c., and did and committed the several acts in his second plea mentioned. The Plaintiff sur-rejoined, as before, that the said close called the *Far End Close*, and in which, &c. continually for 20 years and more before, and at the said first time when, &c., had been and was separated, divided, and inclosed from the said waste, and occupied and enjoyed in severalty, and adversely to the said Earl, and to all those whose estate he had, &c. and without the exercise and enjoyment of the said supposed common of pasture, and without any entry thereupon made for or relating thereto, and concluded to the country.

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The Defendant demurred, and assigned for causes, that the Plaintiff had not in and by his sur-rejoinder confessed and avoided, traversed, or denied the several facts and matters pleaded by the Defendant in his rejoinder, or any of those facts and matters; and for that the said *Robert* ought either to have denied some fact alleged therein, or admitting the same to be true, to have shewn by his sur-rejoinder how and in what manner he the Plaintiff was discharged therefrom, and how the same were avoided. And that the Plaintiff had by his sur-rejoinder endeavoured to put in issue matters different and immaterial to those offered and alleged by the Defendant in his rejoinder; and that the Plaintiff's sur-rejoinder did not shew what estate, right, or title, the Plaintiff or any other person had, to separate, divide, and inclose any part of the close in which, &c. from the said waste; or by what means, or how the same was approved, separated, and inclosed, and also that the sur-rejoinder did not take any issues whatever upon any of the matters pleaded in the rejoinder, nor bring to issue the same, or any matters whatever stated in the pleadings of this cause: and also that the Plaintiff's sur-rejoinder was calculated to introduce unnecessary entries, pleadings, and proceedings on the record; and also that the sur-rejoinder concluded to the country, whereas the same ought to have concluded with averments as to the matters therein contained, and verifications thereof.

Shepherd Serjt. in support of the demurrer. It was the intention of the parties to raise by these pleadings the necessary question to try this right of common, and the fact is, that the whole of *Far End Close* formerly was parcel of the waste of the manor, and part of it has been inclosed above 20 years, and part has been inclosed for a shorter period than 20 years. It is intended by the rejoinder to put in issue the fact that the part of the close

on

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on which the trespass was committed, has been taken in within 20 years. If the Plaintiff meant to deny it, he ought to have pleaded, that the *locus in quo* was not part of the waste.

The Court observed, that the Defendant had omitted a fair opportunity which the plaintiff gave him, to traverse an allegation, which the Plaintiff could not have supported, but by proving *that the whole of Far End Close* had been inclosed above 20 years; for if the Defendant had taken issue on the replication, as it stood, and if any part of *Far End Close* had been inclosed less than 20 years, the issue must have been found for the Defendant: it did not differ from the common case of pleading *liberum tenementum*, where if the Defendant proves he has a single acre in the vill, the issue is with him, whatever quantity of land the Plaintiff may have there: and if the Plaintiff had meant to dispute the particular spot, he should have newly assigned. But here the rejoinder is bad, for it admits the replication, and traverses nothing: it does not deny that the site of the trespass is *Far End Close*. The Plaintiff could not have pleaded that the *locus in quo* was not part of the waste, for it continued to all intents part of the waste for 20 years; and even after that time it continued part of the waste, so that the lord might have recovered it in a real action within 60 years.

The parties had leave given them to amend.

As to the main question which the parties meant to try, *Lawrence* J. observed, that the council were properly agreed upon the point, that if the common had been inclosed twenty years, the commoners' right of entry was gone; and he mentioned the following case of *Creach* v. *Wilmot*:

CREACH

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DERBY, Summer Assizes, 1752. Trespass for breaking closes, &c. Justification by a commoner, as being part of a common, &c. Evidence, that some of the closes had been inclosed above forty years, and that the Plaintiff had a little house built on one of them; and it was insisted by the Plaintiff that this no longer remained a part of the common, that the possession had fixed the freehold in the cottager, and that the commoners were bound by the statute of limitations. Answered, that a right of common cannot be barred by the statute of limitations: that the question was on the mere right, and therefore though the statute of limitations would have been a bar in ejectment or formedon, where the land was in question, yet in this action, where the right only is in question, the statute is no bar.

LEE C. J. A possession of above forty years has been proved, and there is no difference between the lord of a manor and a commoner. The lord could not have brought an ejectment after twenty years' possession. Here, the commoner, if he had any right, should have brought an assize of common, and not made an entry. The jury were directed to find for the Plaintiff.

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Nov. 17.

The instructions called a *præcipe* given by the attorney to the filazer are not process in the cause; and it is not necessary that they should contain a clause of *ac etiam.*

If the sheriff make a warrant to four, *jointly and not severally*, and one make the arrest, the Court will not interfere to discharge the Defendant on motion.

A warrant to four *jointly and not severally*, clearly will not authorize an arrest by one.

If a Plaintiff proceeds by a second original *capias*, instead of *testatum capias*, a second affidavit to hold to bail is not necessary.

Whether in such case it is necessary to file an office copy of the affidavit with the filazer of the second county, *Quære?*

At least the omission does not so far vitiate subsequent proceedings, that the Court on motion will discharge a Defendant from arrest.

SHEPHERD Serjt. obtained a rule *nisi* that the Defendant, on filing common bail, might be discharged out of the custody of the sheriff of *Surry*, for three objections; first, that only one affidavit had been made for holding him to bail, and that had been filed with the filazer of *Middlesex*, and that a *capias* having issued into *Middlesex*, and the Defendant not being there found, the Plaintiff had not sued out a *testatum capias*, but another original *capias* directed to the sheriff of *Surry*; but, notwithstanding, had not filed with the filazer of that county an office copy of the affidavit to hold to bail, which, *Shepherd* said, the practice in such case required, pursuant to the statute 12 *G.* 1. *c.* 29. *s.* 2. Secondly, the memorandum called a *præcipe*, given to the officer as instructions to prepare the *capias*, and which was in the following terms, "*Surry. Capias* for *E. Boyd* against *J. Durand*, returnable on the morrow of *All Souls*. Oath for 8900*l.* and upwards," contained no clause of *ac etiam.* Thirdly, that the sheriff of *Surry* had made his warrant "to the keeper of the gaol of the said county, and also to *W. Benton*, *R. Faulkner*, and *R. Hindson*, his bailiffs," commanding them and every of them *jointly and not severally*, that they should take the Defendant, &c. to answer the Plaintiffs in a plea of trespass, and also in a plea of debt for 1600*l.*; but that the arrest was made by *Faulkner* and another not named in the warrant, and without any assistance of the gaoler, *Benton*, and *Hindson*.

Lens

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Lens and *Best* Serjts. on behalf of the Plaintiffs, shewed cause against this rule. As to the first objection, the same person executed the office of deputy filazer for *Middlesex* and for *Surry*; he had been instructed to file in *Surry* an office copy of the affidavit to hold to bail, and had been paid for it; but through urgent pressure of business he had not been yet able to have it copied and filed: but if there were any laches in the officer of the court, that ought not to prejudice an innocent Plaintiff, who had done all that the practice required. It was no where enacted that an office copy of the affidavit should be filed; it was only required that there should be an affidavit, without reference to any particular county, and there is one.

To the second objection, this instrument called a *præcipe*, is only an authority given by the attorney in the cause to the filazer, from which he is to prepare the original writ: it is neither "writ, bill, nor process issuing out of this court," in which instruments only does the stat. 13 *Car.* 2. *st.* 2. *c.* 2. require that "the certainty and true cause of action shall be particularly expressed."

To the third objection. There is a diversity between authorities created by the party for private causes, and authority created by law for execution of justice. *Co. Litt.* 181. *b.* *Rex* v. *Fowler*, 1 *Salk.* 350. S. C. 1 *Ld. Ray.* 586. It was held, that though the warrant may be wrong, yet if the writ be right, the party is rightfully in the custody of the sheriff. *Lambard. Eirenarcha*, *c.* 2. *p.* 89. If such a precept be addressed to twain, yet one alone may serve it. And here the bailiff is no stranger to the warrant, though certainly he ought to have attended to the restriction the sheriff imposed on the execution of it.

Vaughan

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Vaughan Serjt., for the sheriff, was permitted to come in and shew cause on the following day. He prayed that the Court would leave the Defendant to pursue his ordinary remedy by action, against either the sheriff or his bailiff. Warrants in furtherance of justice are to be favourably expounded, and a joint warrant has often been expounded as a joint and several warrant: *Lashbrook's* case, *Hutt.* 127. *Rex* v. *Hobbs*, *Yelv.* 25. And a strong reason is there given: the sheriff's intent is to have the party arrested, and whether by one or more, *ipsi non refert.* *White* v. *Whitshire*, *Palm.* 52. But whether rightly arrested or not, since he is in the custody of the sheriff, he is where he ought to be, and the sheriff has a right to hold him, having a writ by which he may legally be held, and this is very different from the cases where the Plaintiff has been colluding, or has taken the Defendant by violence, as in *Birch* v. *Prodger*, 1 *New Rep.* 135. And it is enough for the sheriff, if he can lay before the Court a reasonable doubt whether the Defendant is entitled to his discharge. So held, *Lee* v. *Gansel*, 1 *Cowp.* 9. And here is no fault in the sheriff: he makes out a good warrant, but the bailiff mistakes it. In *Housin* v. *Barrow*, 6 *T. R.* 122. the warrant was bad.

Shepherd and *Manley* Serjts. in support of the rule.

1. It is not sufficient to make the affidavit to hold to bail, it must also be filed. *Reeks* v. *Groneman*, 2 *Wils.* 226. and *Hussy* v. *Baskerville*, there cited. Though the business of the two counties is conducted in the same chambers, that can make no difference: they are totally distinct offices, and the filazer of *Surry* cannot legally know what affidavits are filed with the sheriff of *Middlesex*. If a *testatum capias* had issued, that would guide the enquirer to the original *capias*, by which he might find the affidavit; but this is a second original *capias*, and if there is neither a second affidavit made, nor an office copy of the

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first filed in the second county, the Defendant has not that opportunity which the statute meant to give him, of ascertaining the nature and extent of the cause of action. By the copy not being filed the crown also is defrauded of a stamp duty. The clear known distinction is, that if a second original *capias* issues, there must be a new affidavit of debt filed in the second county, where a *testatum capias* issues, that is unnecessary.

2. As to the *præcipe*, it was held in *Barnes* 117. *Hay* v. *Mann*, that the want of the *ac etiam* clause in the *præcipe* was fatal. [*Mansfield* C. J. A *præcipe* is a nonsensical word as applied here. A *præcipe* is the name of a writ, but this is a little worthless memorandum, which is no authority at all. The real *præcipe* is the first authority.]

3. In *Birch* v. *Prodgers*, the attorney *Plaistead* having been forcibly detained till the sheriffs' officer, with a proper authority, came to take him, the Court nevertheless ordered his discharge. This shews that the authority of the sheriff to detain the Defendant is not the criterion. *Housin* v. *Barrow*. The sheriff had a good writ, and had made a good warrant; but the bailiff himself having inserted another name, the Court discharged the Defendant. All this was for good reason. If the arrest is made by an authorized officer, the sheriff is responsible for his acts, but he is not answerable for the acts of unauthorized persons. If *Faulkner* had been guilty of the greatest abuses in this arrest, the sheriff would not be responsible, for he never trusted him alone, but expressly required that *Benton* and *Hindson* should assist, to prevent any misconduct of *Faulkner*. This is very different from the case of a mere joint warrant, for the sheriff absolutely prohibits the execution to be by any other than all the four. If the Court will permit the sheriff to detain a man who is improperly arrested, it will lead to great abuses; men will be entrapped, or arrested on a *Sunday*,

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and brought to the sheriff on the following day. In all the cases cited, there has been a regular warrant, yet the Defendants have been discharged. They offered to undertake that the Defendant, if discharged, should bring no action against the sheriff or bailiff.

MANSFIELD C. J. The question is not now before the Court, whether any action might be brought here: an action might perhaps lie against the bailiff for arresting without proper authority: but the question is, whether the Court will discharge the Defendant. A writ has issued to the sheriff. The sheriff has him under arrest, under that writ. There has been no act of violence committed by any one, no fraud in any one, much less in the Plaintiff, who would be injured by his discharge. The sheriff makes his warrant to four, for the greater security, that if any injury should arise by the misfeasance of the officer, the sheriff might have sufficient security to indemnify him for that which the injured party would be entitled to recover against himself: but the sheriff here ratifies the act of the officer, by receiving the Defendant into custody when taken. Who is hurt by it? No one. Where is he? Where he ought to be. Who has him? The sheriff, who ought to have him. Then what reason is there to discharge him? In what case will the Court discharge a Defendant? Not in this certainly. The only case like this, is that in the 6th *Term Rep.* The Courts have leaned against irregular arrests, in order to avoid the violence that might attend them: there certainly is no supporting this arrest under the warrant, in an action against the officer; for to argue that this is an authority to arrest severally, is to argue in direct opposition toall the strength and meaning of language. As to the objection of the *præcipe*, it is quite nothing: with respect to the practice of filing an office copy of the affidavit, it is a singular one, and it may deserve considera-

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tion whether the practice is proper, of suing out a writ of *capias* alike into two counties, instead of pursuing the old common law practice, of suing out a *testatum capias*. The act of parliament never contemplated this practice, and therefore could not provide for it: no rule of Court, or law, requires an office copy to be filed in the second county; it is consonant indeed to the spirit of the act of parliament that there should be one, but the deputy filazer for both counties is the same, and it cannot much affect the justice of the case, that he reads the affidavit in the character of filazer for *Middlesex*, rather than in the character of filazer for *Surry*. If the old practice were adhered to, all difficulty on this point would be avoided.

Heath J. I can find no case in which the Court has interfered in a summary manner to discharge the Defendant, but where he has been arrested either by force, or fraud. In *Housin* v. *Barrow* the Court discharged the party, in order to discourage the practice of inserting other names in the warrant. We should do injustice by discharging the Defendant; none by retaining him: if he is injured, he has his remedy.

Lawrence J. I am of the same opinion. As to the practice regarding the issuing of a *testatum capias*, the act of parliament does not say that more than one affidavit shall be made; and the practice has prevailed, of sending a copy to the filazer of another county, who thereupon makes out a *capias*. Here the filazer, having the original in his hand, and much business, thinks it unnecessary to copy it, and to read it from the copy, but makes out the *capias* from the same original affidavit, and leaves it to be copied afterwards. No injury is hereby done to the Defendant; for he might, and from the affidavits it appears that he did, peruse the original affidavit instead of the copy. As

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to the sheriff, there is no fraud, and no violence, but the sheriff makes a warrant to four officers, and one of them takes the Defendant. Then the sheriff receives him, and he is in the proper custody; and there is no reason for the Court to discharge him. If he is injured, he may seek his remedy against the officer.

CHAMBRE J. entirely concurred in all the reasons, and thought that it would be a very mischievous exercise of the discretion of the Court, if they were to liberate this Defendant.

Rule discharged.

KING *v.* FOSTER and Another.

Nov. 17.

A menial servant of his majesty is not liable to arrest, although he publicly carries on trade and the debt was contracted in the course of his trade.

BEST Serjt. upon the authority of *Bartlett* v. *Hebbs*, 5 *T. R.* 686., had obtained a rule *nisi*, that the bail-bond, which had been given in this case, might be delivered up to be cancelled, upon an affidavit which stated that by a warrant issued by the Earl of *Chesterfield*, master of the horse, the Defendant *Foster* had been appointed coachman in ordinary to his majesty, and was daily liable to be called on to drive his carriage.

Shepherd Serjt. shewed cause on an affidavit which stated that *Foster* and *Otway* publicly carried on a considerable business as inn-keepers and stable-keepers in the *Strand*, under the name of *Foster* and Co. and that *Foster* was the principal manager of the concern, and had himself accepted, under the signature of *G. Foster and Co.*, the bill upon which this action was brought, and which bill had been received in payment, not carelessly, but upon previous inquiry made, and satisfactory information received, as to the respectability of the Defendants as tradesmen. He also said, that if his trading were known to the superior

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rior officers of the household, the Defendant would be discharged from his employment. It was not to be permitted that a Defendant publicly and ostensibly carrying on trade, and obtaining credit, should shelter himself from his creditors under any privilege whatever.

Best Serjt. *contrà*. This is the privilege of his majesty, not of his servant.

Mansfield C. J. Whether it is proper that a menial servant of the king should be permitted by his majesty to carry on trade in any way, is not for us to consider. It may be a very proper thing, or it may be improper, because those who deal with such a servant are abridged of their remedies. But, as it has been justly said, it is the privilege of the king; and, beyond doubt, this Defendant's employment is not colourable, but his real occupation, and he must, therefore, be discharged. It would be an extraordinary thing if the servants of a nobleman, or member of parliament attending his duty there, should be privileged; and if the servant of the king should not. If the Defendant is not entitled to his discharge, he may be arrested and taken from his box, as he is driving his majesty to the House of Lords.

Rule absolute.

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TUCKER *v.* CROSBY.

Nov. 17.

The Defendant is entitled to a suggestion for costs under the *London* Court of Requests act, though it appears that if the Plaintiff had postponed the commencement of his action a few months, his cause of action would have been good for more than 40*s*.

It must appear to the Court, that the parties were within the jurisdiction when the cause of action arose.

BOTH the Plaintiff and Defendant resided in the city of *London*, and the action was brought to recover 44*l*., the price of some engravings executed by the Plaintiff for the Defendant; but *Lawrence* J., at the trial of the cause at *Guildhall*, was of opinion that the evidence shewed that the work was done upon a credit which was not expired at the time of bringing the action; and the Defendant recovered 1*l*. 8*s*. only.

Best Serjt., upon affidavit of the facts, had obtained a rule *nisi* for entering a suggestion on the roll, to entitle the Defendant to costs under the *London* Court of Requests act.

Pell Serjt., who had successfully resisted a similar rule in the first instance, because the affidavits did not distinctly state that the Defendant was resident in *London* when the cause of action arose, as was held necessary in *Brooks* v. *Moravia*, 2 *H*. *Bl*. 220. now shewed cause against this rule, upon three grounds: first, that the affidavit did not state that the Defendant "was liable to be "summoned to the Court of Requests." *Barney* v. *Tubb*, 2 *H*. *Bl*. 356. this objection was made amongst others, and *Buller* J., in giving judgment, held, "that the affidavit ought to have contained all the facts necessary to bring the case before the Court, and that there a material allegation was wanting; namely, that the Defendant was liable to be warned." Secondly, the affidavit did not shew the Defendant to be, within the stat. 3 *Jac*. 1. *c*. 15. *s*. 2. "a tradesman, victualler, or labouring man." Thirdly, This was not a case where the "sum to be recovered," the expression used in the 4th section of that act, "did not amount to 40*s*." for it was admitted at the trial that work

to

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TUCKER v. CROSBY.

to the amount of 32*l.* at least, had been done; though part of the debt was not due when the action was commenced: and the Defendant, as it is sworn, offered to pay the 44*l.* if the Plaintiff would pay his own costs, which shewed that there was a good cause of action. The Court was not ultimately bound by the finding of the jury, but might exercise a discretion here, as well as in giving costs under the statute of *Eliz.*, where the words also are, "the debt or damages to be recovered."

Best supported the rule.

The Court. On the evidence the verdict was right, and the further sum was not due. *Barney* v. *Tubb* was on the *Middlesex* act 23 *G.* 2. *c.* 19., which is differently worded, but this act has not the words "liable to be summoned."

Rule absolute.



Nov. 18.

KINNERLEY and Others, Assignees of BRYMER, *v.* HOSSACK.

An allegation of an agreement to set off a specific joint debt against specific separate debts, previously accrued, is in substance proved by evidence of an agreement prior to the debts accruing, to set off all joint debts that should thereafter arise, against all separate debts that should thereafter arise.

THIS was an action of *assumpsit* for goods sold and delivered. The Defendant pleaded, as to all the said promises, except as to the sum of 11*l.* 4*s.* 6*d.* parcel, &c. *non-assumpsit;* and as to the said 11*l.* 4*s.* 6*d.*, that *Brymer*, long before he became a bankrupt, was indebted to the Defendant and to *Pringle*, his partner in trade, in

52*l.*

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52*l.* 19*s.* for work and labour, &c.; and that the Defendant was indebted to *Brymer*, before he became a bankrupt, in 11*l.* 4*s.* 6*d.*, and that *Pringle* was indebted to *Brymer* before he became a bankrupt, in 19*l.* 2*s.* 6*d.*; and thereupon it was agreed, before *Brymer* became a bankrupt, between *Hossack*, *Pringle*, and *Brymer*, to set off and deduct the said sums of 11*l.* 4*s*, 6*d.* and 19*l.* 2*s.* 6*d.* from the said sum of 52*l.* 19*s.*, and that they should give him credit for, and allow and deduct the sum out of the said 52*l.* 19*s.*, and only claim and demand against him the residue and balance of the said 52*l.* 19*s.*, after deducting thereout the said sums of 11*l.* 4*s.* 6*d.* and 19*l.* 2*s.* 6*d.*; and he averred that the Defendant and *Pringle* had given *Brymer* credit for, and had deducted and allowed the said sums of 11*l.* 4*s.* 6*d.* and 19*l.* 2*s.* 6*d.* out of the said 52*l.* 19*s.*, and had only claimed and proved under the commission of bankrupt awarded and issued against *Brymer*, under and by virtue of which the Plaintiffs sued in that action as assignees, the balance of the said sum of 52*l.* 19*s.*, after deducting and allowing thereout the said two sums of 11*l.* 4*s.* 6*d.* and 19*l.* 2*s.* 6*d.* The Plaintiffs replied by traversing that it was so agreed before the bankruptcy, and issue was taken thereon. Upon the trial of this cause, at the *Middlesex* Sittings in this term, before *Mansfield* C. J. *Brymer*, the bankrupt, proved that he had been a tailor, and the Defendants were bricklayers, and partners, and that ever since 1804, he had been in the course of dealing with the Defendants, who had jointly erected buildings for him, and that he had made clothes for *Hossack* and *Pringle*, separately; and that it was agreed between them that their separate debts to *Brymer* might be set off against the debts of *Brymer* to them jointly; but that the general agreement was made before the present debts were contracted, and there had been no express communication of the like nature as to these particular sums. *Best* Serjt. contended that the plea was not proved, because there

was

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was no agreement as to the specific debt. The jury, under the direction of *Mansfield* C. J., found a verdict for the Plaintiff, with liberty to move the Court to enter a verdict for the Defendant, if the Court should be of opinion that the general agreement proved, to set off all debts, would support this allegation of an agreement for setting off this particular debt. Accordingly, *Clayton* Serjt., having obtained a rule *nisi*,

Best Serjt. shewed cause. It must be understood by the plea, that all the sums were due before the agreement was made, and the agreement is stated as relating to those debts only that were previously due; which is very different from an agreement that whatever sums shall become due in the course of trade shall be set off against each other; but the agreement must be proved such as it is alleged.

Clayton, *contrà*. This, in its origin, was an executory agreement, but has been executed by the bankrupt, as far as the transactions occurred before his bankruptcy; and the Defendant might, therefore, plead it as an agreement executory, and it is applicable to each particular debt as it arises. This, therefore, brings the case within the principle established by the case of *Langdon* v. *Knight*, *Bull. N. P.* 300., that it is sufficient if the substance of an issue be proved. This issue is substantially proved. As to the form of the plea, it is stated that "it was *thereupon* agreed;" the word thereupon may fairly be referred to the time of making the agreement, not to the time when the debts were contracted; and the relative order of the facts is not averred.

Cur. adv. vult.

MANSFIELD C. J. now delivered the judgment of the Court. This is an action brought by the assignees of *Brymer*, a bankrupt. *Brymer* was indebted to *Pringle* and

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and the Defendant jointly; and they were separately indebted to *Brymer*. And the question is upon the set-off. The agreement which subsisted between the parties was proved at the trial by *Brymer*. It was objected that the evidence of *Brymer* did not support the plea, because there was no specific agreement relating to that sum. At the trial I was strongly impressed with the idea that the plea could not be supported, though the justice of the case was clearly in favour of the Defendant; and I gave liberty for the Defendant to move. But, on consideration, we are of opinion that the evidence does support the plea. In the general case of set-off, whenever any two mutual debts are contracted, the law applies to them as they arise. These debts not being mutual, could not be set off under the general law; but the plea states, that there was an agreement with respect to these debts. We think it no stretch of the law to hold, that the agreement applies to each particular transaction as it arises. It resembles the usual practice in trade, of two tradesmen furnishing goods, ordering work for each other, and of giving mutual credit for the amount. In the common case of supplying goods, or doing work, under special terms as to the mode of payment, it may be pleaded as an agreement on those terms for the specific articles in question, though no agreement was actually made for that particular occasion.

Rule absolute to enter a nonsuit.

WOOD v. CHADWICK.

Nov. 21.

A false addition in the description of bail is a fatal objection.

JOHN SMALL, one of the bail in this case, was described in the notice as a gentleman: being opposed on examination he represented himself to be a baker. The

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Wood v. Chadwick.

The Court rejected him, and desired it might be understood in future as a general rule, that a false addition to the name of the bail should be considered as a ground of rejection.

Shaw v. Masters.

An enlarged rule may be made absolute on the last day to which it stands enlarged.

PER *Curiam.* If a rule is drawn up for a certain day, the party has till the last moment of that day, to shew cause, so that it cannot be made absolute till the next day. But if a rule is enlarged, it may be made absolute at any time on the last day to which it is enlarged.

Nov. 23.

ENWELL v. Oakley.

A Plaintiff who levies costs and expences of an execution, in addition to the sum recovered by the judgment, under 43 *G.* 3. *c.* 46. *s.* 5. must at his peril take care to keep them within such a reasonable sum as will be afterwards allowed in taxation by the prothonotary; otherwise the Court, on motion, will order the excess to be restored, with costs to be paid by the Plaintiff.

BEST Serjt. had obtained a rule *nisi*, that the sheriff of *Surry* might return to the Defendant the sum of 3*l.* 11*s.*, which he had levied under a writ of *fieri facias* issued in this cause, together with the costs of the application. The Plaintiff had obtained judgment for 91*l.* 16*s.* only, including both costs and damages; and the sheriff had levied 101*l.* 5*s.* 6*d.*

Clayton Serjt. shewed cause on an affidavit of the Plaintiff's attorney, which stated that the Defendant having no effects in *Middlesex*, where the venue was laid, the deponent had sued out a writ of *fieri facias* into *Middlesex*, and also a writ of *testatum fieri facias* from *Middlesex* into *Surry*, and that he had made a calculation as to the

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the expence of the executions and a fair charge for the trouble the deponent would have in recovering the debt and costs, which amounted in the different items to 5*l.* 1*s.* 6*d.*, no part of which had been added or allowed in the taxation of costs by the prothonotary. That the deponent did not however add the whole of 5*l.* 1*s.* 6*d.*, but to prevent any reasonable objection, added to the 91*l.* 16*s.* only 3*l.* 11*s.* for the costs of the writs of execution, and his trouble, (making together 95*l.* 7*s.*) which he considered himself entitled to do by virtue of the act 43 *G.* 3. *c.* 46. *s.* 5., and the deponent disclaimed all knowledge of the levy for the other 5*l.* 18*s.* 6*d.* the residue of the 101*l.* 5*s.* 6*d.* levied, which latter sum was in fact levied for the sheriff's poundage and fees.' *Clayton* contended that the object of this act of parliament, upon the construction of which the question arose, was, to give the Plaintiff an indemnity, that he might receive entire the sum recovered by his judgment.

Best endeavoured to support the rule.

Per Curiam. It is an extraordinary act; for it prescribes no measure for the reasonableness of the expences; the prothonotary cannot before-hand tax them: in this case there were two writs; but it is very often beneficial to the Defendant to make the execution more expensive; as if he is desirous that the sheriff shall keep possession of the goods for the Defendant's benefit, instead of instantly selling them. Surely it is meant that any expences so fairly incurred, shall be paid: but it is impossible that the prothonotary can conjecture before-hand what those expences will be. We do not see what we can do, otherwise than to refer it to the prothonotary to ascertain whether the sum levied is reasonable or not. The object of the act was very wise, to prevent actions being brought on judgments, by giving the Plaintiff his costs of the execution

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cution without it, but the legislature has not looked far enough as to the means of getting it effected. We see no convenient mode of examining the reasonableness of the individual case, but by reference to the prothonotary.

On this day the prothonotary reported that 1*l.* 6*s.* had been taken more than was due; upon which the Court made the rule absolute, for returning that sum; but inasmuch as it was quite a new question, they refused the costs, but desired that now, since they had considered the act of parliament, it should be understood in future, that if attornies take more than what is clearly due to them, the costs of the application to restore it must be paid by the Plaintiff; and the rule was, as to the residue,

Discharged.

Nov. 23.

HOLROYD and Others, Assignees of LEE, *v.* GWYNNE.

A trader who has no settled home, or counting-house, but takes up a temporary abode at a public house, in the place to which his business carries him, commits an act of bankruptcy by departing from such public-house with intent to delay his creditors.

The purchase of one lot of timber with intent to sell again, will make a man a trader.

If standing timber be sold to a trader, with a proviso that in case of bankruptcy the vendor may retake it, such a condition is void under 21 *Jac.* 1. *c.* 19. *s.* 11. if the bankrupt has the disposition of the goods.

THIS was an action of trover brought to recover the value of certain timber which had been taken and sold by the Defendant, and to which the Plaintiffs claimed to be entitled as the property of their bankrupt. The Defendant, who was originally the proprietor of the timber, in *May* 1807, sold it growing, by public auction, and the bankrupt became the purchaser. The parties executed a contract by which *Gwynne* in consideration of 127*l.* paid by *Lee* in part of 1139*l.* to be paid at the times therein mentioned,

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tioned, and of the covenants of *Lee* therein expressed, granted, bargained, and sold to *Lee* 347 oaks, and 11 ash trees, *then standing and growing* on certain lands therein described, with the tops, boughs, and bark thereof; with ingress for *Lee* to enter upon the lands, and to cut down and carry away the timber, &c., to hold the said timber, with the tops and boughs, unto *Lee*, his executors, &c., as his own proper goods and chattels, to his and their own use for ever; subject nevertheless, amongst other restrictions, to an express condition, that in case *Lee* should fail to pay the purchase-money on the days and in manner therein appointed, *or should become bankrupt or insolvent before the several days of payment, or before payment should be made to* Gwynne *by* Lee, it should be lawful for *Gwynne* to secure, distrain, take away, detain, and convert to his own proper use and benefit, all the timber and trees thereby bargained and sold, which should be then standing, growing, being, or cut down, in or upon the said lands, or carried elsewhere, and the bark, boards, poles, joints, rafters, charcoal, cordwood, and other stuff arising therefrom; and to sell and dispose of the same, and every part, and by and with the money thence arising to pay and satisfy the said principal purchase-money, or such part thereof as should be then unpaid, and all charges and expences attending the felling, converting, and selling the same timber; rendering the overplus, if any, to *Lee*. Under this agreement *Lee* entered, and cut and converted the timber. In *June* 1808 a commission of bankrupt issued against *Lee*; and *Gwynne*, supposing that he had a lien upon the property under this agreement, repossessed himself of such part thereof, as the bankrupt had not disposed of, and sold it by auction.

This cause was twice tried: the first time at the *Hereford* Spring Assizes 1809, before *Graham* B., when it appeared that *Lee* had usually resided at *Islington* with the Plaintiff *Holroyd*, who was his aunt; he had attended pub-

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lic auctions of timber from the year 1806 downwards; but there was no proof that he had purchased more than three parcels, of which this was the first: he had stripped and sold the bark of this parcel, and the tops: he had also sold a part of the timber to the officers of government, and a small part for laths. After he had purchased this parcel, and while he was selling and converting it, he lodged at a public-house called the *Royal Oak* at *Bwlth* in the county of *Brecon*, which place was near the spot where the timber grew. He afterwards left that place for fear of his creditors; and to avoid them, took an obscure lodging in *Duke Street*, *Bloomsbury:* he was at that time unable to pay his debts, and for that reason did not dare to go to *Bwlth*, where his business was still proceeding. *Graham* B. thought that no act of bankruptcy was proved, and nonsuited the Plaintiffs.

Shepherd Serjt. in *Easter* term obtained a rule *nisi* for a new trial, against which *Williams* Serjt. in *Trinity* term shewed cause on two grounds. 1st, He contended that there was no proof that *Lee* was a trader. 2dly, That there was no act of bankruptcy. 1st, This was the first lot of timber which *Lee* had ever purchased; and the question is, whether he was a trader at the time of that purchase, not whether he became a trader afterwards. He afterwards indeed bought another parcel at *Taunton*, but even then he was not a trader: he did not pay for it; he went down there when he was insolvent, and obtained it as a mere swindler: the greater or less number of persons to whom he sold the timber, bark, and branches, cannot make him the more or less a trader. 2dly, As to the act of bankruptcy, while he lived with his aunt at *Islington*, he had neither counting-house nor dwelling-house; no persons ever came there to do business with him; he had no home, and therefore could not depart from his dwelling-house with intent to delay his creditors: he was not within the bankrupt laws; and the case of *Robertson* v. *Liddell*, 9 *East*,

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East, 487. which was cited at the trial, does not, on account of all these circumstances, apply to the present case.

The Court, stopping *Shepherd*, made the rule absolute.

Upon the second trial at the *Hereford* Summer Assizes 1809, before *Bayley* J., the Plaintiff proved the agreement above stated. The Defendant contended, that under the proviso in case of bankruptcy, he was entitled to a verdict; but *Bayley* J. directed the jury, that if the Defendant had permitted the bankrupt to exercise such a controul and management over the timber, down to the time of the bankruptcy, as to give him the appearance of being the real owner, he was of opinion that the Defendant could not resist the Plaintiff's present demand, for that it was a fraud on the bankrupt laws; if therefore they thought that the bankrupt had had that controul and management, they should find a verdict for the Plaintiffs, which they accordingly did; and the learned Judge gave the Defendant liberty to move to enter a nonsuit.

Williams in this term obtained a rule *nisi* to set aside the verdict, and have a new trial, on the authority of *Roe* v. *Galliers*, 2 *T. R.* 133.

Shepherd now shewed cause. The bankrupt, within the meaning of the statute of 21 *Jac.* 1. *c.* 19. *s.* 11., had "by the consent and permission of the true owner and proprietary," this timber "in his possession, order, and disposition, and took upon himself as owner, the sale, alteration, and disposition of it." The question then is, whether a private contract can defeat the policy of the statute. The case of a lease does not apply. (To which the Court agreed.) In *Roe* v. *Galliers*, *Buller* J. pointed out the distinction: he observed that a creditor would not rely on

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a bare possession of the land by the occupier, unless he knew what interest he had in it.

The Court, stopping *Shepherd*, called on *Williams* to support his rule, who admitted that the case of *Horn* v. *Baker*, 9 *East*, 215., was too strong to be got over, and submitted to have his rule for a new trial

Discharged.

Nov. 23.

PARRY v. HINDLE.

A joint demise by husband seised in right of his wife, and his wife, is disproved by evidence of a receipt for rent given by the husband only.

IN replevin, the Defendant made conusance as bailiff to *John Macnamara* and his wife; the Plaintiff pleaded in bar, 1st, that the Defendant was not bailiff to *John Macnamara* and his wife; 2dly, that the Plaintiff did not hold as tenant to *John Macnamara* and his wife. Upon the trial of this cause at the *Westminster* Sittings in this term, before *Mansfield* C. J., it appeared that the wife was seised in fee of the premises by inheritance, and the husband seised in right of his wife; and the only evidence of any demise, was a bill for 60*l*. for three quarters of a year's rent, drawn by *John Macnamara* solely, on the tenant, and accepted and paid by him; and the authority to the bailiff to distrain, was derived from *John Macnamara* solely. *Mansfield* C. J. thought this evidence disproved the joint demise, and a verdict passed for the Plaintiff, with liberty for the Defendant to move to enter a verdict for himself, if the Court should be of opinion that the evidence produced was sufficient to prove the issues in his favour.

Accordingly,

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Accordingly, *Vaughan*, Serjt. on this day moved; but the Court held that the verdict was right. [*Mansfield* C. J. A husband seised in right of his wife may, and usually does, demise alone during the coverture: when he dies, all the rent accrued, up to the time of his decease, does not go over with the reversion to the wife; it is assets in the hands of the husband's executors. The wife has nothing to do with the demise or the rent.]

LAWRENCE J. If the demise had been by the wife before marriage, and had continued after, it might have been proper to state a demise by the husband and wife jointly; though even upon that point there is a doubt. If this demise was by parol, upon the husband's decease the tenant's estate would be absolutely determined; if it was by the deed of the husband and wife, it would have determined by the husband's decease, unless the wife had afterwards confirmed it.

Rule refused.

ATHERSTONE *v.* HUDDLESTON.

Nov. 24.

If a creditor has both proved his debt under a commission of bankrupt, and commenced an action against the bankrupt, before the passing of the stat. 49 *G.* 3. *c.* 121. *s.* 14. that act does not compel him to relinquish his action.

ONSLOW Serjt. had on a former day obtained a rule to shew cause why the Defendant should not, in pursuance of the statute 49 *Geo.* 3. *c.* 121. *s.* 14. be discharged out of the custody of the sheriff of *Lincoln* as to the Plaintiff's suit in this action, the Plaintiff having made

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1809. his election, by proving his debt under the commission of bankrupt issued against the Defendant.

ATHERSTONE v. HUDDLESTON.

Vaughan Serjt. shewed cause against this rule upon the facts. The Defendant was arrested at the Plaintiff's suit on the 17th of *May* 1809. In the *August* following he became and was declared a bankrupt. The debt on which he was arrested accrued long before the commission. The Plaintiff claimed and proved his debt under the commission; but afterwards refused either to receive the dividend arising from the sale of the bankrupt's estate, or to give the Defendant his discharge. He at first suggested a doubt whether the act gave the Court jurisdiction to discharge the Defendant. [But the Court was quite clear that when an act of parliament prohibits a thing, it gives the courts of law power to enforce the prohibition.] This arrest, claim, and proof of debt, took place long before this statute, when it was lawful for every man in the kingdom to prove under the commission, and proceed at law at the same time.

Onslow supported the rule. The act is retrospective: it says, "any creditor who *has* or shall have brought any action;" if it rested there, it might be doubtful whether a case where the proof of the debt preceded the action, were within the statute; but it declares that the proving or claiming shall be an election, so that it equally comprehends the cases where the proof precedes the action, and where the action precedes the proof: the words are not restricted by any order of time, and the intent of the act was, that there never should be an action, and a proof under the commission, co-existing.

MANSFIELD C. J. Looking at this clause it is impossible to make it retrospective. It seems to leave actions commenced before the statute just as they were; for the words

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words are, that after passing the act, it *shall not* be lawful for any creditor who has or shall have brought an action, to prove a debt under the commission for any purpose, or to have the claim of a debt entered on the proceedings, without relinquishing such action; that is clearly prospective; for it says that it *shall not be* lawful to prove or claim; therefore one who had proved his debt before the act does not come within the prohibition: and the act proceeds to declare that the proving or *so* claiming, that is, claiming in future, after the passing of that act, shall be deemed an election by such creditor to take the benefit of the commission with respect to the debt *so* claimed or proved by him. How can it be supposed that proving or claiming the debt shall be deemed an election, when the creditor, without any election, has both proved and brought an action before the passing of this act? He could not have meant to elect: he meant to do both.

HEATH J. I am of the same opinion. It would be a matter of great injustice if a different construction were to prevail.

LAWRENCE J. concurred.

Rule discharged, (but without costs, the question being a new one).

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Nov. 21.

BARNES, DOWDING, and BARTLEY, *v.* HEDLEY and CONWAY.

After usurious securities given for a loan have been destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest is founded on a sufficient consideration, and is binding.

THIS was an issue between the Plaintiffs, who were the executors of *William Webb* deceased, and the Defendants, who were assignees under a commission of bankrupt which issued against *William Harrè* and *Henry Suthmier*, directed by order of the Lord Chancellor, in order to try whether the bankrupts on the 13th of *August* 1802 were indebted to *Webb* in any and what sum of money. The trial came on at the sittings in *London Mich.* term 1808 before *Mansfield* C. J., when a verdict was found for the Plaintiffs for the sum of 11672*l.* 4*s.* 2*d.* subject to the opinion of the Court on the following case:—By a written agreement made on the 15th of *May* 1800, between *Webb* and the bankrupts, the former agreed to advance money from time to time, upon interest at 5 *per cent.* to *Harrè* and *Suthmier*, who carried on the business of sugar-bakers in co-partnership, in order to enable them to purchase raw sugars; and in consideration of such advances, the bankrupts were also to pay to *Webb* a commission of 5 *per cent.* for all sugars which were to be bought of him, or provided for Messrs. *Harrè* and *Suthmier*; and in order to secure to *Webb* the balance which might become due to him on these transactions, *Harrè* and *Suthmier* executed and gave to him certain deeds and securities. *Webb* made out four several successive half-yearly accounts between him and *Harrè* and *Suthmier*, on the footing of this agreement, and various sums of money were paid to *Webb* on these accounts from time to time by the bankrupts: these accounts

closed

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closed on the 10th *August* 1802, when a considerable balance was due from the bankrupts to *Webb*. These accounts comprised the principal monies actually advanced, and interest at 5 *per cent.*; and also 5 *per cent.* on all sugars purchased by the bankrupts. *Webb* never purchased or procured any sugars for the bankrupts; but the same were always purchased by the bankrupts themselves in their own names. It was admitted on the trial, that the original agreement of the 15th *May* 1800 was illegal and usurious, and that no part of the balance could have been recovered by *Webb* from *Harrè* and *Suthmier* if they had set up the usury, and *Webb* was informed by the attorney of *Harrè* and *Suthmier* in *July* 1802, that these transactions were usurious, and that his whole debt was in danger of being lost, and a writ of *latitat* was actually sued out by the bankrupt's attorney upon the statute of usury; but this fact was unknown to *Webb*. In consequence of this intimation, it was agreed between *Harrè* and *Suthmier* and *Webb*, that *Webb* should make out fresh accounts, leaving out all the charges for commission; and should only charge them with the principal money, together with legal interest; and that the original deeds and articles in the possession of *Webb* should be given up by him, and cancelled accordingly. *Webb* accordingly made out such fresh account, in which he omitted the whole charge for commission; and the balance due to him amounted to the sum of 11672*l.* 4*s.* 2*d.*, which balance was composed of principal monies actually advanced under the agreement of 15th *May* 1800, and of interest at 5 *per cent.* fairly and legally calculated; the whole commission and every objectionable charge being omitted. This account so corrected, was on the 12th *August* 1802, delivered to the agent of *Harrè* and *Suthmier*; and on the following day they acknowledged this balance to be due to *Webb*, and promised to pay the same; whereupon the deeds and securities executed to

Webb

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Webb by *Harrè* and *Suthmier* when the original agreement was entered into, were produced by *Webb* or his agent in the presence of *Harrè* and *Suthmier*, and were then cancelled and burnt. The question for the opinion of the Court was, whether under the circumstances of this case the Plaintiffs were entitled to recover the above balance of 11672*l.* 4*s.* 2*d.*? If the Court should be of that opinion, a verdict for such sum was to be entered for the Plaintiff: if otherwise, the verdict to be entered for the Defendants.

This cause was twice argued: first in *Easter* term 1809, by *Best* Serjt. for the Plaintiffs, and *Vaughan* Serjt. for the Defendants; and again in *Trinity* term 1809, by *Shepherd* Serjt. for the Plaintiffs, and *Lens* Serjt. for the Defendants.

Arguments for the Plaintiff:—There are two questions in this case; first, Whether the promise that has been made to repay the sum lent, with legal interest, is avoided by the statutes of usury; 2dly, Whether there was any good consideration to sustain the promise. 1. No positive law prohibits the present contract. The statute 9 *Ann. c.* 16. has three branches: the first prohibits certain acts: the words of it are, "that no person *upon any contract* which shall be made after the 9th day of *September* 1714, take directly or indirectly, for loan of any monies, wares, merchandize, or other commodities whatsoever, above the value of 5*l.* for the forbearance of one hundred pounds for a year;" the second branch is, that all *bonds, contracts, and assurances* whatsoever, made after the time aforesaid, for payment of any principal, or money to be lent or covenanted to be performed upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of 5*l.* in the hundred, *shall be utterly void;* the third branch

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branch inflicts a penalty, namely, that all persons whatsoever, which shall *upon any contract* take, accept, and receive above the sum of *5l.* for the forbearance of one hundred pounds for a year, shall forfeit for every such offence the treble value. The whole of this section then has for its object the *contract;* it avoids the contract; and the effect of the statute therefore is, that the money has been lent without consideration: the description of contract which it avoids, is only such whereupon or whereby there shall be reserved or taken above the rate of *5l.* by the hundred. But the present agreement is not a contract of that description; for the case expressly finds that it is purged of every thing usurious: it therefore is not forbidden by these statutes. One instance will suffice to shew the monstrous absurdity of contending that it is: the stat. 13 *Eliz. c.* 8. *s.* 4. enacts, that all brokers, solicitors, and drivers of bargains for contracts or other doings against the said statute, whereupon shall be reserved or taken more than after the rate of *10l.* (now by the statute of *Anne* reduced to *5l.*) for the loan of one hundred pounds for a year, shall be to all intents and purposes judged, punished, and used as counsellors, attornies, or advocates in any case of *præmunire.* If this contract for the repayment of the principal and legal interest is illegal for one purpose, it must be illegal for all purposes; and under the statute of *Elizabeth*, an attorney who had prepared an instrument to effectuate the honest purpose of securing to a creditor his real debt, would be subjected to the penalties of a *præmunire.* If a man enters into a contract to receive usurious interest, he is not bound to perform it; and if at the day of payment he should receive the principal and legal interest only, and should instantly again lend it to the payer, it is clear that it would not be an illegal loan, and that he might recover it back on an implied promise. Usury between collateral parties does not avoid a contract. *Ellis* v. *Warnes*,

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Warnes, Cro. Jac. 32. S. C. *Moor*, 752. *Warnes* being indebted to *Alder* in 100*l.* gave him an usurious bond for 30 *per cent.* interest, and by way of discharging the principal, he became joint obligee with *Alder*, in a bond for payment of a debt of 100*l.* due from *Alder* to the Plaintiff; and it was held on demurrer, that the usury did not vitiate that security. That was usury between third persons; but the same thing holds where the usury is between principals. In the case of *Wright* v. *Wheeler*, 1 *Camp. N. P.* 165. *n.*, the obligee in an usurious bond cancelled it, and the obligor gave him another bond for principal and legal interest only, and *Lawrence* J. held that the statute did not avoid it. The case of *Cuthberd* v. *Haley*, 8 *T. R.* 390. is much like the case in *Moor*. If a man indebted to another in a *bona fide* debt, makes a contract with his creditor, on which he stipulates to pay usurious interest, although the contract is void, it does not avoid the original debt. *Gray* v. *Fowler*, 1 *H. Bl.* 462. Secondly, there is a good consideration for the new promise; for the money has been actually received by the Defendant, and there is a foundation in justice for the new contract. *Hill* v. *Atkins*, *Cowp.* 289. Lord *Mansfield* held, that when an executor had assented to a legacy, "it became a demand which in law and conscience he was liable to pay;" that it was the case of a promise made upon good and valuable consideration, which in all cases is a sufficient ground to support an action. It is so in cases of obligations which would otherwise only bind a man's conscience, and which, without such promise, he could not be compelled to pay. For instance, where an infant contracts debts during his minority, if, after he comes of age he consents to pay them, an action lies. So *Hawkes* v. *Saunders*, *Cowp.* 289. "A legal or equitable duty is a sufficient consideration for an actual promise." And though these cases have been since overruled, it has been on a ground which does not impeach this

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this principle, namely, on the ground that the Court has not jurisdiction in cases of legacies. *Buller* J. says in the last case, " if such a question were stripped of all authority, it would be resolved, by inquiring whether law were a rule of justice, or whether it were something that acts in direct contradiction to justice, conscience, and equity. But the matter has been repeatedly decided." *Truman* v. *Fenton*, *Cowp.* 544. A promise to pay made by a bankrupt after obtaining his certificate, revives the debt. That notwithstanding an usurious security given, the money lent is a debt in equity and conscience, and ought to be repaid with legal interest, has long been acknowledged in courts of equity. 2 *Ves.* 567. the Lord Chancellor says, " the Court does not relieve against usurious contracts to make a man lose his principal as well as his legal interest." *Scott* v. *Nesbit*, 2 *Bro. Ch. Ca.* 649. upon an application to set aside a judgment tainted with usury, it was held, " that it could be displaced only by the Plaintiff's doing what was just, and that it must stand for the money actually paid, with legal interest." Indeed the practice is there so well established, that if a bill, filed to set aside an usurious security, does not voluntarily offer to repay the principal and legal interest, it is cause of demurrer. The Plaintiffs could not have had the original securities set aside in a court of equity, without offering these terms. This Court not long since, on setting aside an annuity, in the case of *Burdon* v. *Browning*, *ante* 1. 520. required the Defendant to submit to the terms of repaying the principal and interest. [*Mansfield* C. J. observed that this was always by agreement of the parties: that the Court had no power to prescribe the terms. *Lawrence* J. observed that actions had been allowed to recover back the money, as paid without consideration: it was so held in *Shove* v. *Webb*, 1 *T. R.* 732.] And if it be objected that *Wright* v. *Wheeler* was the

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case of a bond, for which no consideration needs to be shewn, it is sufficient to say, it was not decided on that ground, but on the sufficiency of the consideration; and if there had not been a new consideration, the old consideration must have remained; which was illegal, and an illegal consideration would have avoided the bond, though no consideration was necessary. But there is another consideration for the present promise: the Plaintiff had deeds and securities for the money; it is true they were vitiated by the usury, but it might be uncertain whether the Defendants could prove it, and unless for that proof, the Plaintiffs could enforce them: therefore the giving them up to be cancelled was a valuable consideration for the second contract.

For the Defendant it was observed, that there was only one loan in this case, and that was on an usurious agreement, which had been acted on, and the usury completed: and it was long and strenuously urged that in the grammatical construction of the second branch of the first section of the statute of *Anne*, the relatives "whereupon and whereby" had for their antecedent, not the words "contracts and assurances," but the word "usury," and that the effect was, to avoid not only the instruments by which the money was secured, but the debt, and the very transaction of lending. [*Lawrence* J. It cannot annihilate the sum of money itself, nor the fact of the receipt of the money; and the Plaintiffs' argument throughout admits that every duty which the law imposes of repaying the money, was at an end; therefore whatever may be the grammatical construction of the sentence, it will not vary the argument.] In *Robinson* v. *Bland*, 2 *Burr*. 1081. on the statutes of gaming, Lord *Mansfield* C. J. draws a marked distinction between the contract and the securities. It is not contended, as the Plaintiffs imagined it was, that the second contract is

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tainted with usury; but that there was no consideration for it; and in order to enforce a promise, it is not sufficient that a man has given it upon his judgment that some obligation lies on him: contracts purely voluntary are not enforced either in law or equity. Here no ground for the promise is shewn, either of advantage to the maker, or detriment to the other party. The old securities are not delivered up to be cancelled, but are actually destroyed, rather for the safety of the lender, against whom they would have been evidence to subject him to heavy penalties, than for the advantage of the borrower. This case therefore is distinguishable from the case cited of a bond, for which no consideration needs to be shewn. Besides, the issue to be tried in *Wright* v. *Wheeler*, upon the Defendant's plea, was, whether the usury was committed in giving that very bond; and the fact was against him. In over-ruling *Hill* v. *Atkins*, and *Hawkes* v. *Saunders*, as was done in 7 *T. R.* 690. *Deeks* v. *Strutt*, the Courts at least determined that not every conscientious motive for a promise will support an action at law. [*Mansfield* C. J. The overturning of those decisions did not touch any principle which applies to the present case; it went on the ground that the ecclesiastical court was the only legal place where to sue for a legacy: it is not enough as to a legacy, that an executor has at one moment received money sufficient to pay it; but debts are to be paid according to their priority, and it is often necessary to refund: but the decision in *Deeks* v. *Strutt*, had nothing to do with the general ground of conscience.] The cases of conscientious considerations which have been cited, are not analogous. In the case of bankruptcy, the certificate merely destroys the remedy, and leaves the bankrupt a free man: free to pay or not to pay at pleasure. But the legal debt extinguished by bankruptcy is neither *malum prohibitum*, nor *malum in se*; and for an illegal debt, the debtor does not want the aid of a commission

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mission to relieve him from it. Here it is the intention of the statute not only totally to destroy the engagement, but to make usury an offence; and in order to deter persons from being guilty thereof, it meant that a sum of money once usuriously lent, should never under any circumstances be repaid, although it was honestly due; and it would be a complete evasion of the statute, if a man who enters into an usurious contract, may, when he fears the consequences, alter his contract and defeat the provisions of the act. [*Lawrence* J. observed, that if the borrower should repay money usuriously borrowed, he would have no means to get it back from the lender.] The case of the statute of limitations is merely a suspension of the remedy, which the debtor may remove by again acknowledging the debt. The case of an infant is on account of his want of discretion, and his election to annul or confirm his contract is postponed till a more mature age. The case of *Ellis* v. *Warnes*, was the case of an innocent third person. The ground of the practice in courts of equity, is not, that they consider the Defendant as entitled to the money, but because, unless the complainant waives the penalties of the statute, and among them the forfeiture of the money lent, the Defendant could not answer without criminating himself, and subjecting himself to penalties, which a court of equity will not compel him to do. It also is a very different thing whether a Court shall aid a Plaintiff who has the money of another in his hands, to set aside usurious securities, instead of leaving him to his remedy at law, or whether it shall compel a Defendant to repay the money borrowed. Here the Court is called on, not to remain neuter, but positively to compel repayment. *Lloyd* v. *Lee*, 1 *Str.* 94. it was held that a married woman who had given a promissory note, and after her husband's death had promised to pay it, was not liable. Yet there was as much consideration in that case as in this.

[*Lawrence* J.

[*Lawrence* J. The ground of that case, I presume, was, that as the party could not previously be sued on the instrument, there was no forbearance to sue, and therefore no consideration for the promise. And the forbearance being the only consideration alleged in the declaration, though another good consideration might exist, proof of it would not be admissible.] 7 *T. R.* 348. *Mitchinson* v. *Hewson*: the wife was living; and an express promise of the husband to pay her debt was there averred, and after verdict, must be taken as having been proved: that surely was a conscientious consideration; but the Court held that the action could not be maintained.

Arguments in reply. Usury is not now held altogether criminal by the law, but only the excess of it; and things not *mala in se* are not to be carried beyond the very letter of prohibitory statutes. In *Lloyd* v. *Lee* it does not appear that the wife ever received any money on the note for her own benefit, or was at all bound in conscience to pay it; and the case only proves that forbearance is no consideration for a promise made under the influence of terror of an action which would not lie. *Mitchinson* v. *Hewson* is a decision merely on the form of action, that the husband cannot be sued alone for a debt contracted by the wife before marriage. So, in the case of a father promising to pay the debts of his son; in numerous cases it is not consistent either with honour or morality that he should do it. This case is not distinguishable from that of a certificated bankrupt, which rests only on the ground of conscience. Nor is the offence of usury in fact complete till usurious interest has been actually paid; here the payments were made on account generally. It is admitted that where a specific contract on certain terms has been made, an implied contract on other terms cannot be raised; and it may also be safely admitted that the moral obligation to perform a promise, merely because it has

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been given, is not sufficient to maintain an action: otherwise every *nudum pactum* would be good. But it does not thence follow, that the naked fact of a loan having taken place, one man having received the money of another, is not a sufficient consideration for an express separate and independent promise to repay it. Courts of equity could not pursue their present practice, if the repayment of money usuriously borrowed was inconsistent either with law, or morality: they could not either directly or collaterally enforce a thing contrary to law: they proceed on the principle that he who comes to them for aid, must first do that which is equitable. Supposing that the destruction of the securities had been for the mutual benefit of both parties, still it would be a sufficient consideration for the promise, because it was for the benefit of the Defendants. [*Lawrence* J. observed that there was one other case which had not been mentioned, and which seemed to bear on the subject. *Fitzroy* v. *Gwillim*, 1 *T. R.* 153., where in trover for goods which had been pledged for money advanced on an usurious contract, Lord *Mansfield* C. J. held that it was necessary for the Plaintiff to prove a previous tender of the money actually due.]

Cur. adv. vult.

In the course of the present term the Judges of the Court sent to the Lord Chancellor the following certificate of their opinion:

" This case has been argued before us by counsel, and " we are of opinion that under the circumstances the " Plaintiffs are entitled to recover the above balance of " 11,672*l.* 4*s.* 2*d.*"

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AUSTERBURY *v.* MORGAN.

Nov. 25.

Where judgment is entered on a warrant of attorney, though a bond also is given, it is not necessary, under 8 & 9 *W.* 3. to suggest breaches.

BEST Serjt. had obtained a rule *nisi* to set aside the writ of *fieri facias* issued and executed in this cause, for irregularity, with costs, under the following circumstances.

The Defendants executed a bond to the Plaintiff in the penal sum of 300*l.*, conditioned for the payment of an annuity of 36*l.* They also executed a warrant of attorney to the Plaintiff as a collateral security, whereon the Plaintiff had entered up judgment and sued out this execution; and the irregularity complained of, was, that the Plaintiff had not suggested upon the judgment roll any breach of the condition of the bond, or had any damages been assessed, or inquiry executed, in manner required by the statute 8 & 9 *W.* 3.

Onslow Serjt. shewed cause against this rule, on two grounds: first, that the warrant of attorney contained the usual power to the attornies to release all manner of errors, writs of error, defects, and imperfections whatsoever, to be had, made, done, or suffered, touching, or concerning the said judgment, or in, or about, touching, or concerning any writ, &c. entry, or other proceeding whatsoever, in any way concerning the same; and that unless therefore it could be shewn that a suggestion on the roll was not an entry nor a proceeding, it was comprehended in this release. But if that were not so, yet the case did not come within the statute, which had always been strictly and literally construed: this judgment was founded not on the bond only, but on a warrant of attorney, which is not mentioned in the act.

Here

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Here the Court, interposing, called on *Best* to support his rule; who feeling the point to be against him, submitted to have the rule discharged; but without costs, because the question had been fairly raised.

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SKINNER *v.* DAVIS.

A person plying as a porter in the city of *London*, and resorting to a house of call there, but not lodging in the city, is not a person "seeking his livelihood in *London*," within the *London* Court of Requests act, 39 & 40 *G.* 3. *c.* civ.

CLAYTON Serjt. moved upon the stat. 39 & 40 *G.* 3. *c.* civ. *s.* 12. to restrain the Plaintiff's costs, who upon the trial of this cause at the last *Westminster* Sittings, had recovered 4*l.* 5*s.* only, whereas the Defendant was a freeman of *London*, and although he slept at a lodging in *Finsbury*, in *Middlesex*, he was liable to be sued in the *London* court of requests, because he "sought his livelihood" in *London*, within the 5th section, being an auctioneer's porter, and plying at two public houses in the city, where he was always to be found, as the Plaintiff well knew; for he had himself addressed letters to the Defendant there.

The Court observed, that the words "seeking a livelihood," certainly were of very general import; but they must be restrained to the seeking it by some means, which are local, and which shew where the Defendant is to be found, so that he may be served with a summons. He may change his public house every day: and the Plaintiff's knowledge of his resort is merely a casual circumstance.

Rule refused.

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M'CLURE v. M'KEAND.

Nov. 27.

If the cause of action can be proved partly to arise in a foreign country, the Plaintiff may safely give the requisite undertaking to retain the venue.

HEYWOOD Serjt. having obtained, on the usual affidavit and waver of error, a rule *nisi* for changing the venue in this case from *London* to *Lancaster*, *Pell* Serjt. shewed cause, upon the ground that it appeared on the declaration, that the action was brought for not accounting for the proceeds of goods shipped at *Liverpool*, to be sold by commission at *Barbadoes*; and he urged that no cause of action was complete, till the goods should have arrived at *Barbadoes*, and until a sufficient time for the sale should have elapsed, and the Defendant should have refused either to account for the proceeds of the goods, if sold, or to re-deliver what remained unsold: consequently the cause of action partly, if not wholly, arose at *Barbadoes*.

Heywood contrà. The contract was made, and the goods shipped in *Lancashire*.

LAWRENCE. J. referred to *Gerard* v. *De Rocbeck*, 1 *H. Bl.* 282.: and *Heath* J. mentioned a case, where proof that the cause of action arose in *Scotland*, was held a sufficient compliance with the undertaking to give material evidence in the county where the venue was laid; and the Court

Discharged the rule.

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SEYMOUR v. BARKER and WIFE.

A fine must certainly express what estate it purports to grant.

The Court will not permit a fine *sur concessit* to be levied for the purpose of passing such estate as the party may have, (it being dubious what estate he has,) by the description of "all and whatsoever he hath in the tenements."

Nor is it permitted to combine two operations in the same fine.

SAMUEL *Barker* and *Ann* his wife were seised of different estates in different hereditaments, (that is,) in some they were seised to them and the heirs of the said *Ann* for an estate *pur auter vie*, in others, the said *Ann* was seised to her and her heirs, for a like estate *pur auter vie*, in others she was seised in fee simple, and in others the said *Samuel* and *Ann* were seised of an estate to them and the heirs of the said *Ann*: and being so seised, they, intending to pass their several estates, acknowledge the concord of a fine (a copy whereof follows). "And the agreement is such, (that is to say,) "that the said *Samuel* and *Ann* have granted the tenements aforesaid with the appurtenances to the said "*William* and his heirs, to have and to hold the said "tenements with the appurtenances to the said *William* "and his heirs, for and during all the term, and other "estates, and all and whatsoever else, the said *Samuel* "and *Ann* have in the tenements aforesaid with the "appurtenances." The cyrographer of fines refused to make out the indentures, alleging that the limitation must be certain, meaning, "to the conusee and his heirs for ever," or for the life of the tenant, or *pur auter vie*, &c. and not, as the concord is, "to the conusee and his heirs for and during all the terms, and other estates, and all and whatsoever else the conusors have in the premises."

Williams Serjt. moved on a former day in this term, that the cyrographer might make out and deliver the indentures of fine in the form above mentioned. He said that the parties had covenanted to levy a fine, and it was the opinion of a very eminent conveyancer, that it should be

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be a fine *sur concesserunt;* for the parties did not mean to make a forfeiture. There could not be a better way than this, which he proposed, for three reasons. 1. As to the parties themselves, this species of fine shall not operate further than to convey the estate which the parties lawfully may convey, if such be their intent. A fine *sur conusance de droit, come ceo*, creates a forfeiture, if made by a tenant for life. [*Mansfield* C. J. What is the operation of those words, whatever else they have? You are to help out the record by extraneous evidence of what estate the conusor had!] Certainly. In *Pigot* v. *Earl of Sarum*, 2 *Mod.* 112. *Pemberton*, who was a great lawyer, and understood these things, says, "indeed this fine *sur concessit* is the most harmless of all others, and can be compared to nothing else than a grant of *totum statum suum, et quicquid habet*, &c. by which no more is granted than what the cognisor had at the time of the grant; and so it hath been always construed. Indeed there is a fine *sur concessit*, which expresses no estate of the grantor, and this is properly levied by tenant in fee or tail; but when particular tenants pass over their several estates, they generally grant *totum et quicquid habent in tenementis prædictis*, being very cautious to express what estate they had herein. When this fine *sur concessit* was first invented, the judges in those days looked upon the words '*quicquid habent*,' &c. to be insignificant; and for that reason in *the Year Book*, 17. *Edw.* 3. *pl.* 66. they were refused. The case was, two husbands and their wives levied such a fine to the cognisee, and thereby granted '*totum et quicquid habent*,' &c. which words were rejected, and the Judge would not pass the fine, because if the party had nothing in the land, then nothing passed; and so is 44 *Edw.* 3. *pl.* 36. by which it appears that the Judges in those times thought these fines did pass no more than what the cognisor had; and for this there are a multitude of authorities in the year books."

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books." [*Mansfield* C. J. That goes to the operation of the fine, not to the practice.] It is competent to the party to grant whatever he has, supposing there is no legal objection to it; and the parties will abide by the chance, whether any thing passes by these words. There is nothing in this form which is improper, or disgraces the records of the court, why should not the party have it? Such a case was once before *Buller* J., who said, if a conusor is advised by his counsel to levy a particular fine, the Court have nothing to do with it. [*Heath* J. You cannot levy a fine where it does not make a certain end, as upon condition.] In the last term it was determined that a fine *sur concessit* would pass a fee: *Ludlow* v. *Drummond*, *ante*, 84. [*Heath* J. It must state what the interest is.] If we purport to pass a fee, we are afraid it may be a forfeiture. How often has the Court doubted whether an estate were for life or in fee!

Shepherd Serjt. for the cyrographer, stated the common form of all fines to be, that they express what the interest is which they purport to pass. In a fine *sur conusance de droit, come ceo*, it is stated as an estate in fee; in a fine *sur conusance de droit tantum*, the estate is stated as a reversion; in a fine *sur concessit*, it is stated as an estate for life or years: but in the practice of the office, it is never permitted to combine two operations in one fine, as for instance, to pass as well an estate for fee, as also an estate for life, or for years. Such a fine indeed was levied in the last illness of the preceding cyrographer, under the order of *Buller* J., whereby a fee and a life estate passed together; but the Court was never moved to set it aside for uncertainty, which they would have done: if this mode of levying a fine may be allowed, instead of three sorts of fines, there would be three hundred. The words "all and whatsoever estate they have," are so vague, that they carry no certainty. The officer

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is come hither only through a wish to know whether the practice of the office ought to be adhered to or not.

The Court desired *Williams* to enquire further, whether there were any precedent of a fine levied in this form. It must be a very common case that persons conveying are uncertain what estate they have, and would be glad to do this: if he should find any other instances of similar motions, he should mention them.

On this day *Williams* admitted that *West*'s *Symboleography* contained no precedent on the subject, and that in the 3d of *Edw.* 3. such a general fine was rejected: but in 5 *Edw.* 3. 11. *pl.* 26. according to one (*Maynard*'s) edition, and 7 *Edw.* 3. according to the edition of 1596, was the following case; "*nota*, that a man and his wife who had an estate in certain tenements for the term of their two lives, and by their deed *in pais* leased and granted to *John de Hunton* the estate which they had in the tenements, and afterwards by fine levied they would have granted to *John* and released to him the same tenements for the term of their lives, and the Court would not accept the fine; but afterwards the fine was engrossed and accepted in this manner, that the man and his wife remised and quit claimed to *John de Hunton quicquid habuerunt in prædictis tenementis, &c. quod mirum fuit*, to give judgment for the fine upon a thing which was not certain, &c. *Vide contrarium supra, Trinitat. Anno.* 3. *Sed talis finis admissus fuit in itinere North', inter Simon de Dreiton et Willielmum' Curteis*, &c. [*Mansfield* C. J. It is a great way to go back for a precedent to the 7th of *Edw.* 3.; but it does not appear what the *habendum* was: it cannot be that a fine for the lives of the grantors is bad. *Heath* J. Come to modern precedents, something within 300 years.] 3 *Newman*, 163., which

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which cites 2 *Mod.* 112. 1 *Wood's Conveyancer*, 735. [*Heath* J. It is no authority; it is a very indifferent collection of precedents.] A fine needs not to have such precise form as a writ or a judgment; but a conusance of a fine, and a grant and render, should have the like construction as another conveyance between party and party; 5 *Co.* 38. and by grant of a man's estate, all that he hath shall pass; if then there be no difference between a fine and a deed, if such words would be good in the one, they must be good in the other.

MANSFIELD C. J. A fine *sur concessit* is no forfeiture, as I understand, because whatever estate it purports to give, it will grant no more than ought to pass, and operates only on the estate a man has: and even if a tenant for life granted to *A. B.* and his heirs; I apprehend that he should be taken to grant only that which he can legally grant. What you wish could be obtained by two fines no doubt. If you conveyed by fine *sur concesserunt* to a trustee, and then granted the estate in fee by fine *sur conusance de droit, come ceo*, it would do. But since you have no precedent, we had better adhere to those which are established; otherwise we should have every fine *sur concessit* in this form.

HEATH J. thought the form of the proposed fine too uncertain, and asked why the parties did not grant a lease for 99 years, determinable with the life, and there would then be no forfeiture: it would be a dangerous thing to introduce any innovation in the form of fines. It would never be known what estate passed by a fine.

LAWRENCE J. The granting an estate for life, I suppose, will not answer the purpose. I suppose the object is to pass a fee, if you have a fee; if not, to pass an estate for life. You may first grant the estate for life by

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fine *sur concessit*, so as to avoid a forfeiture, and then grant the reversion by fine *sur conusance de droit tantum*.

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The Court expressed a wish that they could give costs to the meritorious officer who had brought this question before the Court, but it was not in their power. *Lawrence* J. said, it might be considered as a necessary expence of performing the duty of the office, for which he received his fees.

Rule refused.

ZEEVIN v. COWELL.

Nov. 28.

If, after action commenced, and before declaration, the Defendant offers to pay the debt and costs, and the Plaintiff refuses to receive it, the Court will permit the Defendant to pay into court the debt and the costs up to the time of his offer only. And the Plaintiff will be compelled to pay the costs of the application, and all costs in the action subsequent to the offer.

THE Plaintiff's attorney on the 2d of *November* applied by letter to the Defendant for an immediate adjustment upon a policy of insurance; and threatened, if the sum of twelve guineas was not immediately paid him, to commence an action. Receiving no answer, he sued out and served process on the 4th. On the 6th the Defendant's attorney offered him the sum of twelve guineas, and the costs of the action up to that time, which the Plaintiff's attorney then declined to accept, and proceeded to deliver a declaration.

Shepherd Serjt. on behalf of the Defendant, had on a former day obtained a rule *nisi*, empowering the Defendant to pay into court the sum of twelve guineas, with the costs of the cause to be taxed up to the 6th day of *November*, and to stay all further proceedings if the Plaintiff would accept it in satisfaction of his demand; and in that case requiring the Plaintiff or his attorney to pay the costs of that application, and all the costs of the action subsequent to the 6th of *November*; but in case the Plaintiff

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tiff would not accept that sum, then that the twelve guineas might be struck out of the declaration.

Best Serjt. now shewed cause against this rule, upon an affidavit that the Plaintiff was out of the realm, and that his attorney had received no instructions since the action commenced for settling it. This was, he said, an unheard-of application, and would wholly change the practice of the court. The Defendant might have availed himself of the interval of five days which elapsed between the Plaintiff's claim and the commencement of the action to make a tender, if he thought fit; but having neglected that opportunity, he must now wait till the period when he should be enabled to pay money into court under the usual rule. It was the object of this motion to give the Defendant all the benefit of the common rule, without subjecting him to the usual consequence of payment of costs. And whatever the Court may have done in cases where no previous demand had been made, since a demand had been made here before the action brought, the Plaintiff was entitled to the costs of the declaration which had been delivered, as well as the previous costs.

Shepherd Serjt. *contrà*. The Court will gladly establish a precedent to check a practice now too frequent, where an action being commenced, the Defendant offers to discharge the demand, but the Plaintiff refuses to receive the debt and costs in that stage of the cause, and insists upon increasing the costs by proceeding until the Defendant is in a condition to pay money into court. If the attorney was authorised to receive the sum in the Plaintiff's absence from the kingdom before the action commenced, there could be no good reason why he might not equally receive it now, without further communication with his client. Several similar applications had

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had lately been granted in the Court of King's Bench; and he remembered a case in this court, where the debt and costs having been offered and rejected in an early stage of the cause, the Defendant afterwards paid the money into court under the usual rule; and the Plaintiff having taken it out, the Court on motion varied that rule by exempting the Defendant from payment of the costs incurred subsequent to the offer.

The Court made the rule absolute; but at first inclined to discharge so much of it as required the Plaintiff to pay the costs of the present application: they desired, however, that it might be understood, that in subsequent cases, when this rule of practice should be better known, the costs of the motion would also be given against the Plaintiff. And in the present case they ultimately directed, that in case the Plaintiff should take the money out of court, he should pay the costs of the motion.

Rule absolute.

LAIDLAW, Demandant; COX, Tenant; BROWN and Another, Vouchees.

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In a recovery, if the acknowledgment of the vouchees is taken abroad, a notarial certificate made to authenticate the affidavit of the commissioners must distinctly state that the affidavit was sworn.

BEST Serjt. moved that a recovery might pass. The affidavit of the acknowledgment was taken in *America*, before a magistrate there, and was authenticated by a certificate under the notarial seal of *Peter Lohra*, a notary public, certifying that *Jacob Baker* Esq., before whom the annexed affidavit was, on the day of the date thereof, in his, *Peter Lohra*'s presence taken and subscribed, and who had attested the same in the usual and customary manner, was an alderman and magistrate of the city of *Philadelphia*, by lawful authority duly appointed, commissioned,

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missioned, and qualified, and by law authorized to administer oaths and affirmations.

The Court held that the certificate did not state with sufficient distinctness the administration of the oath, which was the most important part, and that that fact must not be left to be gathered by inference only; and deeming it necessary to abide by the rule of court, with much reluctance they refused the application.

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PHILIPS *v.* ASTLING and Another.

If the drawee of a bill goes abroad, leaving an agent here in *England* with power to accept bills, who accepts this for him, the bill, when due, must be presented to the agent for payment, if the drawee continues absent.

Upon a guaranty given of the price of goods to be paid by a bill, due notice of the non-payment must be given both to the drawer and guarantee, unless both drawer and acceptor are bankrupts when the bill becomes due.

Upon a contract to guarantee a bill for a given sum, the guarantee would not be liable to that extent on a bill given for a larger sum.

Whether the words "say a bill of 500*l.*" define the exact sum, or give a latitude, *quære.*

ASSUMPSIT. The declaration stated, that in consideration that the Plaintiff would sell and deliver to *Davenport* and *Finney* certain goods, to the amount of 500*l.* to be paid by a bill for the amount drawn by *Davenport* and *Finney* on *Houghton* at six months, and also in consideration of a certain premium at the rate of 5*l.* *per cent.* thereon, to be therefore paid by the Plaintiff to the Defendants, the Defendants undertook to guarantee the payment of the sum for which the bill should be so drawn when the same should become due; and the Plaintiff averred that he afterwards sold and delivered the goods to *Davenport* and *Finney*, to the amount aforesaid, to be paid for as aforesaid, and that such bill of exchange was afterwards, when it became due, duly presented to *Houghton* for payment; but that he refused to pay, whereof *Davenport* and *Finney*, and the Defendants respectively had notice, and were requested to gua-

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rantee the payment of, and pay the amount of the bill; but that they did not nor would guarantee or pay the same.

Upon the trial of this cause at the *Guildhall* sittings after *Trinity* term 1809, before *Mansfield* C. J. it appeared that *Davenport* and *Finney* being desirous to obtain credit with the Plaintiff for provisions for the use of the ship *Providence*, the Defendants gave an undertaking written with a pencil in the following terms. Memorandum.—We jointly and severally undertake to guarantee a payment of 500*l.* at 5*l. per cent.*, say, by a bill drawn on *G. Houghton* by *Davenport* and *Finney* for 500*l.* Dated 10th *Jan.* 1808. The provisions were furnished, and a bill was given in payment for them, dated the 11th of *January*, and drawn by *Davenport* and *Finney* on *G. Houghton* at six months' date, for 515*l.* 11*s.* 10*d.* payable to their own order. It appeared that at the time when the bill became due, *Houghton* was at sea, and remained absent for several months after; but he had a sister residing in *London*, to whom he had given an authority to fill up and accept bills in his name, and to transact other business for him, and who had in fact accepted this very bill. The bill became due on the 14th of *July*: it was not presented for payment to the sister. On the 16th, notice was given to *Davenport* and *Finney* that it remained unpaid, but no notice was given to the Defendants. In *February* 1809 *Davenport* and *Finney* became insolvent; and *Houghton* was declared a bankrupt in *July* 1809. No application was made to the Defendants for payment till after the date of both bankruptcies. The jury found a verdict for the Plaintiff, deducting the 5*l. per cent.* for the premium of the guaranty, which had never been paid: and the Chief Justice reserved liberty to the Defendants to move to enter a nonsuit; accordingly,

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Vaughan Serjt. in this term obtained a rule *nisi* upon two grounds; first, that the contract was to guarantee a bill of the precise amount of 500*l*., and this was a bill for a greater sum. Secondly, that the guaranty not being for the payment of the price of the goods generally, but referring to a bill as a specific mode of payment, it was necessary that all due diligence should be used to obtain payment of the bill before the parties could resort to the guarantee.

Shepherd and *Best* Serjts. now shewed cause. Although on this contract the guaranty would not bind the Defendant to a greater extent than 500*l*., yet, whether the bill be for a greater or less sum is immaterial: if it had been for 1000*l*., or if goods to the amount of 1000*l*. had been sold, the Defendants would have been thereupon liable for 500*l*. of it; for the contract related to the identical sale of provisions for which this bill was given, not to the mere form of the payment: it would be otherwise, indeed, if the guaranty was merely for the payment of a particular bill of exchange. It cannot be said that this sale was not the very transaction meant to be guaranteed, and the contract must be construed according to the intention of the parties. Next, as to the want of diligence: this is not a guaranty that the drawer shall pay the bill, but that the acceptor shall pay it; the guarantee does not stand in the situation of the drawer; and therefore although want of diligence in presenting would discharge the drawer, it does not at all assist the Defendant, for he stands in the situation of the acceptor; and as no want of diligence in presenting the bill for payment would discharge the acceptor, who would be liable, though the bill should be for the first time presented for payment after an interval of many months; so neither is the guarantee, who stands in the place of the acceptor, only, thereby discharged. If any thing had been done

with

with the bill which would discharge the acceptor, perhaps it might discharge his guarantee also: or even if it be supposed that the contract is alternative, that either the drawer or the acceptor shall pay the bill; still, unless the Defendant can shew that all the parties to the bill are discharged, the guarantee continues liable, because he may resort to the acceptor, who is not discharged, though the drawer is: and this transaction takes place upon a valuable consideration.

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Vaughan, in support of the rule, contended, that the Defendants were discharged from their guaranty by the want of presentment to the sister who was the agent of *Houghton*, and by the want of timely notice to the drawers, and to the Defendants; for that the Defendants stood as indorsers of the bill, and as such, had a right to insist upon proof of notice to themselves of the non-payment both by the drawer and the acceptor; and that they had also a right to insist on proof of notice to the drawers, because without notice the drawers were not liable. But the Defendant's remedy against *Davenport* and *Finney* was entirely lost, for want of due notice to them of the non-payment, which was not communicated to them till the 16th. The want of notice to the Defendants at the same time was also fatal; for if the Defendants had on the 14th been apprised of the non-payment, they might have obtained payment of *Davenport* and *Finney*, who, for any thing that appears to the contrary, were then, and for eight months afterwards, solvent; and who, therefore, in the contemplation of the law, might have paid it within that time. All the doctrine of the necessity of notice concerning bills is founded on this supposition. Secondly, to the objection arising on the amount of the bill, the answer made that the Defendants are liable in equity for 500*l*. only, is of no weight; for if the Defendant stands as party to the bill, if the bill is drawn for 1000*l*. he is party to the bill for 1000*l*. *Cur. adv. vult.*

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MANSFIELD C. J. This was an action against two persons on a guaranty, the terms of which are: Memorandum. —We jointly and separately promise to guarantee a payment of 500*l* at 5*l*. *per cent.*, say a bill: dated 10th *January* 1808. Then the bill is given, dated 11th *January*, and accepted; and not having been paid, this action is brought. At the trial there appeared reason to believe, that *Davenport* and *Finney*, the drawers, and *Houghton*, the acceptor, were all at this time insolvent; but there was no proof of it. *Davenport* and *Finney* first became plainly insolvent in *February* 1809, a year after this bill was drawn. There was no evidence of any demand being made on *Davenport* and *Finney* for the money; and no notice was given them of the bill not being paid till the 16th: something was said of a threat to arrest them, but there was no evidence of regular notice. As to *Houghton*, he went abroad; but he left a sister here, of whom a demand might have been made; no demand however was made at the place where his sister was to be found. At the trial it was objected that the Plaintiff could not recover, for several different reasons: First, that the Defendants stood as indorsers of the bill; and that, as indorsers, they had a right to insist on proof of the notice of non-payment both by the drawer and acceptor. On the other hand it was urged, and, as we think, justly, that this was a general guaranty for payment of a bill; not, as usual, a guaranty that the acceptor should pay; but a contract that either the one or the other should pay; and the consequence is, that if the guarantee paid the bill, he would have a right to come both on the drawer and acceptor for repayment; and though want of notice would not discharge the acceptor, yet the guarantee, as the holder, had a right to insist on due notice being given to himself of non-payment by the acceptor; and that as to the drawers, he had a right to insist on notice being given to them of the same fact, for that otherwise he might pay it in his own wrong if they were discharged. As to the second objection, the question

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question is, What is the meaning of the word "say?" for it is objected, that suppose the bill drawn was for 1000*l.* this would not be a guaranty to pay 500*l.* on the bill for 1000*l.* the guarantee would not be bound to pay it; but if "say" means "about" 500*l.* a bill for 515*l.* might answer the description; and if it were necessary to the deciding this action, to ascertain the meaning of that word, if "say" means to fix precisely the sum, and to restrain it from any larger sum, this objection would be good; but it is not necessary to decide that here, for we are of opinion that, unfortunately for the Plaintiff, the Defendant is relieved from the consequence of this guaranty. I strongly think the Plaintiff knew the state of all these persons, and that they were not good; but as *Davenport* and *Finney* did not become insolvent till long after the bill became due, nor *Houghton* till long after the bill became due, I do not know how to give the Plaintiff the benefit of his contract in this case. I thought it possible that cases might have been found on the interpretation of such a guaranty, in the distribution of bankrupt's effects in the Court of Chancery: none such, however, have been mentioned. In the case of *Warrington* v. *Furbor*, 8 *East*, 245., the expression "say at a credit of six months," seems to be used in a positive sense. That case also arose on a guaranty, and Lord *Ellenborough* C. J. expressed the opinion of the Court, that although the insolvency of the parties to a bill would not in general dispense with the necessity of presenting it for payment; yet where it was obvious that it could not avail, the same strictness of proof was not necessary to charge a guarantee; and therefore, if the parties became bankrupts, and notoriously insolvent, it was the same as if they were dead. Now this case is decided on the ground, that the pursuing the course of applying to the acceptor in that case, as here to the acceptors and drawer, would have been of no effect, because there the bankruptcy had already happened before the bill became due. Here the insolvency did not occur till long after the bill became due, and

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and *Houghton's* bankruptcy was long after that. For any thing then that appears, if this gentleman had demanded the money either of the acceptor or drawer, the bill might have been paid. That too was a guaranty of payment of the price of goods; this is for a bill; and the contract necessarily implies that the Defendants will pay it if the Plaintiffs do not, being called on in a proper manner: and therefore, although that case has relaxed the strictness of the proof of presentment and notice, and seems to decide that it is not necessary to pursue the same strictness in order to charge a guarantee as to charge the drawer of the bill, yet it may still be inferred from it, that if the necessary steps are not taken to obtain payment from the parties who are liable on the bill, and solvent, the guarantee must be discharged; and therefore the rule for a nonsuit must be made Absolute.

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LEE v. CASS.

Nov. 28.

In compounding an action on a penal statute which gives no costs, the Plaintiff having agreed to stay proceedings on payment of a sum in equal moieties to the crown and himself, and the entire costs to himself, the crown obtained half the costs also.

COCKELL Serjt. moved to compound a penal action on the statute of usury, upon the terms of paying to the crown 250*l.* and half the costs, which should be taxed by the prothonotary for the Plaintiff; and to the Plaintiff 250*l.* and the other half of the costs. The officers of the crown, he said, had consented on these terms, but refused to consent on any other terms, because the statute not giving costs, whatever the Defendant paid under the name of costs, was in fact an addition to the penalty of 500*l.* and the crown was therefore entitled to half.

Best Serjt. for the Plaintiff, vehemently opposed this condition, and said that the Plaintiff had agreed to stay the proceedings on payment of 250*l.* to the crown, and to himself 250*l.* and the costs of the action and of the application, and it was in the discretion of the Court to stay the proceedings without the consent of the crown, and the terms sought to be engrafted were unreasonable; but the Court observing that the crown could compel the action to proceed, and that the Plaintiff could not help himself, he agreed to the terms.

Rule absolute

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ASTLEY v. RAY and Others.

Under the militia acts 42 *G.* 3. *c.* 90. and 47 *G.* 3. *c.* 71. if a person balloted is found at the time of enrolment to be unqualified for the service, and another is balloted in his place, out of the same list, this is a continuance of the same ballot, and is a legal ballot.

THE principal part of the arguments of the counsel in this case, *Williams* Serjt. for the Plaintiff, and *Shepherd* Serjt. for the Defendant, being referred to in the judgment of the Court, delivered after time taken to consider, are here omitted.

MANSFIELD C. J. This was an action of *assumpsit*, in which the declaration stated, that at the time of the Defendant's undertaking, a certain ballot for persons to serve in the militia of *Great Britain* for the county of *Salop*, in pursuance of a certain act of parliament passed on the 14th of *August* 1807, was about to take place at *Market Drayton*, in the county of *Salop*, and thereupon on the 13th of *January*, in consideration that the Plaintiff had paid to the Defendants 2*l.* 12*s.* 6*d.*, the Defendants undertook to pay to him the sum of 20*l.*, in case the Plaintiff should be duly and legally balloted at the said then ensuing ballot, conditionally, viz. that he should provide him a substitute, or pay a penalty of 20*l.* in lieu thereof, which the Defendants then and there engaged to pay upon his producing to them a warrant or certificate to that effect signed by the magistrates, or a deputy-lieutenant of the county; and the Plaintiff averred that he afterwards, at the said ensuing ballot, to wit, on the 30th *January*, at *Market Drayton* aforesaid, was duly and legally balloted to serve as a militia man in the said militia of the said county of *Salop*, and in pursuance thereof, did afterwards, to wit, on the 13th of *February*, provide himself a substitute, to wit, one *Edward Rowley*, who was then and there duly sworn and enrolled to serve in the said militia, as the substitute of the Plaintiff, of all which

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which premises the Defendants had notice, and the Plaintiff did then and there produce to them a warrant or certificate to that effect, signed by two deputy-lieutenants of the county, *R. Leeke* and *John Cotes*; and by reason of the premises the Defendants then and there became liable to pay to the Plaintiff the sum of 20*l.* according to their undertaking. There was another count which it is unnecessary to state. On this declaration, and on the plea of the general issue, the cause came on to be tried at the last *Lent* assizes at *Shrewsbury*, before *Wood* B., when a verdict was found for the Plaintiff for 20*l.*, subject to the opinion of the Court on a special case, the material parts of which are, That prior to the publication of the proposals after mentioned, a ballot was expected to take place under the militia laws for the county of *Salop*. That the Defendants in *November* 1807, published the following printed proposals: viz. " *Drayton Militia Office.* It " is proposed to all persons liable to be drawn for the " *Shropshire* militia at the ensuing ballot, under the pro" visions of an act passed *August* 14, 1807, that if they " will pay the sum of two guineas into the hands of " *Geo. Ray*, and *Wm. Griffith*, jun. of *Market Drayton*, " they will engage to pay conditionally to every person " duly and legally balloted at the ensuing ballot, viz., " that they do provide themselves a substitute, or pay a " penalty of 20*l.* in lieu thereof, the sum of 20*l.* The " office will not interfere with the parish allowance, " which they believe is half the current price of substi" tutes, but will leave the same to be received by the " balloted subscriber, in addition to the foregoing sum " arising from this subscription." And on the 4th *December* 1807, the Defendants also published the following proposals: " *Drayton Militia Office.* In consequence " of several applications having been made to subscribe " since our books were closed, *November* 28th, we are " induced to re-open them, and to continue receiving subscrip-

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"subscriptions until the ballot takes place, which is expected to be in a few days; but owing to a greater "number of men being wanted in this county than we "at first had reason to expect, we shall not be able to "take any subscription under the following terms: A "subscriber of two guineas will be entitled, if duly and "legally balloted at the ensuing ballot, (from the date "hereof,) to the sum of 15*l.* A subscriber of two gui- "neas and a half will be entitled, if duly and legally bal- "loted at the ensuing ballot, to the sum of 20*l.*,—which "we will engage to pay upon their producing to us a "warrant or certificate to that effect, signed by the ma- "gistrates, or a deputy-lieutenant of this county.— "N. B. The balloted subscriber will be at liberty to "receive the parish allowance, independent of the above "sum. *Ray*, *Griffith*, jun. and *Cook*." The Plaintiff, being a farmer's servant, in the township of *Edgmond*, in the *Newport* division of the hundred of *Bradford South*, in the said county, and liable to the ballot, on the 13th *January* 1808, paid the Defendant two guineas and a half as a subscriber under the above proposals, for which he took the following receipt, annexed to a copy of the second proposals before-mentioned; which receipt was dated by mistake 1807, instead of 1808, and is as follows, viz. "Received *January* 1807, of *Theophilus Astley*, at Mr. "*Briscoe's*, of *Caynton*, two guineas and a half, as subscrip- "tion money, upon the terms of the annexed conditions." The number of persons to be drawn in the *Newport* division was twenty-one; and the persons supposed liable to be drawn were originally divided into twenty-one classes or lists of names, and on the 18th *January* 1808, being the day appointed for the ballot, one person was drawn out of each class or list: three of those classes or lists consisted of eleven persons each, twelve of them consisted of twelve persons each, two of them consisted of thirteen persons each, and the remaining class or list of fourteen persons.

persons (*a*). The Plaintiff was in the same class or list with a person named *John Bettany*, who was the person thus drawn out of the said class or list on the said 18th of *January*. The 30th *January* was appointed by the deputy-lieutenants for a meeting to swear in the persons balloted; when *John Bettany* attended a meeting of deputy-lieutenants then duly held, and claimed to be exempt from the ballot, being under five feet four inches in height; on which he was measured, and found to be only five feet two inches high; whereupon he was sworn, and deposed that he was not seised or possessed of an estate in lands, goods or money of the clear value of 100*l.* (and which in fact he was not;) and the deputy-lieutenants then discharged him without any fine, and immediately then and there caused another person to be drawn out of the eleven names remaining in the same class or list, without altering the same, otherwise than by striking out *Bettany's* name, when the Plaintiff was drawn. Two persons, drawn on the said 18th of *January*, out of other classes or lists, were also discharged at the said meeting on the 30th *January*; and their places were then supplied by two others, drawn in the like manner as the Plaintiff out of the particular class or list for which the vacancies were made by the discharge of those two persons: all was done under the direction of the deputy-lieutenants. The Plaintiff on the 19th day of *February* 1808, found a person named *Edward Rowley* as his substitute, to whom he paid 49*l.* 7*s.* and who was on that day duly sworn to serve as such in the militia, and served accordingly; and the Plaintiff obtained a certificate

(*a*) In the course of the argument it was strongly contended for the Defendants that the inequality of the numbers contained in these classes or lists rendered the ballot irregular and illegal, but the Court were clear in opinion that as that objection had not been urged at the trial, whether it were well or ill founded it could not be insisted on here.

thereof

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thereof as follows: "*Salop*: *Newport* division of the hundred of *Bradford South*.—We do hereby certify that *Theophilus Astley* was balloted to serve in the militia of the said division for the township of *Edgmond*; and that on the 13th day of *February* 1808, *Edward Rowley*, of *Wellington*, cooper, was duly sworn and enrolled to serve in the said militia as his substitute. Dated this 13th day of *February* 1808. *R. Leeke*, *John Cotes*, deputy-lieutenants." This certificate was soon after shewn to the Defendants, and the 20*l.* demanded by the Plaintiff, which they refused to pay, and had not paid the same: the 2*l.* 12*s.* 6*d.* premium had not been demanded or paid. The Defendants contended that the ballot at which the Plaintiff was drawn, did not come within the terms of their engagements; and that they were not liable to pay or repay any thing. I observe in this case the whole passes at *Market Drayton*: there the office is, there the ballot is: it is next to impossible that the Defendants or their agents should not be present there, though not stated in the case; if they did attend, to be sure it would be a monstrous thing for them to stand by, see this man balloted, see him pay the 49*l.*, and yet say I will not pay the 20*l.*: they would naturally be there, to see that none of their subscribers were improperly balloted. The contract certainly is such, and between such parties, that it is incumbent on the Court to effectuate it, unless the Defendants can point out some clear objection. These Defendants are men of business; those of whom they receive the money, would necessarily often be of very humble condition, unacquainted with business, not likely to be accurate in framing of contracts. No doubt this man was balloted, found a substitute, paid 49*l.* and obtained a proper certificate, and shewed it to the present Defendants. All the circumstances are as strong as they can possibly be against the present Defendants. They say, "owing to a greater number of men being wanted in this

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county than we at first had reason to expect, we shall not be able to take any subscription under the following terms: a subscriber of two guineas and a half will be entitled, if duly and legally balloted at the ensuing ballot, to the sum of 20*l.*, which *we will engage to pay* upon his producing to us a warrant or certificate to that effect, and the balloted subscriber shall be at liberty to receive the parish allowance." The person to receive this sum must be duly and legally balloted: now on the terms of the contract, there might be a strong ground to say the legality was sufficiently proved by producing the certificate; for that a person had nothing to do, if balloted, but to find a substitute, get and exhibit a certificate, and receive the money. That might be strongly contended: but the objection to the legality of the ballot is, that a man being balloted, it turned out that he was under the statute measure, and could not be received: at that meeting the deputy-lieutenants proceed to another ballot, and the chance falls on the present Plaintiff; and it is urged that when that chance so fell on the Plaintiff, it was irregular to make that ballot in which the lot fell on him; for that there ought to be a new list made out, and all the forms observed *ab initio*, proper notices given, time for an appeal, &c.: if so, one does not see how the militia could ever be raised. There might be a man too short in every list, and if the lot fell on him, the whole would remain to be done over again, and the militia might never be raised. The persons who draw these acts are not very conversant with drawing, at least with finishing them; one militia officer suggests a clause, and another a clause; and it is a great chance if in an hundred clauses one does not jostle another. Now as to the stat. *42 G. 3. c. 90. s. 53.* which has been relied on, it says, when it shall appear to any two or more deputy-lieutenants assembled at any subdivision meeting, that any person chosen by ballot, is not of the full height of five

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feet four inches, and is not seised or possessed of an estate in lands, goods, or money of the clear yearly value of 100*l.*, and who shall make oath that he is not seised or possessed of such estate, such deputy-lieutenants are empowered and required to discharge him, and *immediately to amend the list* for the place for which such person shall have been balloted, and to cause another person to be chosen in his stead by ballot, according to the directions of the act. The words "to amend the list," I suppose, have created the doubt; if instead, it had been said, that a man under measure should be struck out of the list, which is all the amendment necessary to be done, and that the deputy-lieutenants should again proceed to ballot, it would be a more rational and proper expression: this is not very properly expressed at present: but the case would then have been too clear to raise any doubt on it; because the act contains various provisions regulating what is to be done when *a new ballot* takes place, notices are to be given, and other formalities observed, which, if they were necessary here, the deputy-lieutenants could not immediately proceed to ballot again. There is a material difference too in the expressions used. New lists are not to be made by the deputy-lieutenants, but by other persons: what is here to be done, is directed to be done by the deputy-lieutenants, and no other persons. The sense then is, the name of the short person is to be struck out, and the deputy-lieutenants are to proceed to a new ballot; and if so, every thing has been complied with to entitle the Plaintiff to the 20*l.*, and therefore, whether the Defendant be or be not concluded by his undertaking, so that the certificate shall be sufficient evidence to estop him from contesting the legality of the ballot, we are of opinion that the Plaintiff was legally balloted, and has done every thing required of him to entitle himself to recover the 20*l.*, and therefore the postea must be delivered to the Plaintiff.

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RULE OF PRACTICE AT NISI PRIUS.

Nov. 10.

Trials are not to be put off by consent at *nisi prius*.

THE COURT desired that it might be understood that they would never hereafter put off the trial of a cause upon the consent of the parties and counsel, at the Sittings at *Nisi Prius*, but that the Plaintiff must either proceed to try, or must withdraw his record.

END OF MICHAELMAS TERM

CASES

ARGUED AND DETERMINED

IN THE

1810.

COURTS OF COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Hilary Term,

In the Fiftieth Year of the Reign of George III.

Jan. 23.

Recovery amended by transposing the names of the demandant and tenant.

Roberts, Demandant; Robinson, Tenant.

BY mistake *John Robinson* had been made the demandant, and *James Roberts* the tenant in this recovery. On the motion of *Peckwell* Serjt. the Court permitted the writs of entry and seisin, and the recovery roll, to be amended by transposing the names, so that *James Roberts* should be the demandant, and *John Robinson* the tenant.

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PARKER *v.* HOSKINS. *Jan.* 23.

If an attesting witness appears, upon search made at the admiralty, to be serving in the navy, his absence is sufficiently accounted for to render secondary evidence admissible.

LENS Serjt. moved for a new trial, on the ground that secondary evidence had been admitted of the execution of a bond, by proving the hand-writing of *John Page*, the attesting witness, without sufficiently accounting for his absence, and shewing that due diligence had been used to obtain him. It was a question of great and public importance, exactly to ascertain in what cases secondary evidence may be given. The mother of the witness swore he was in the navy: a clerk from the Admiralty proved that it appeared by their books, that on the 31st of *October*, 1808, *John Page* was transferred from the *Swinger* gun-brig to the *Maria*, and he believed, from report, that he had been captured, re-captured, and was now serving *somewhere* on board another ship in his majesty's service. Here the enquiry dropped.

MANSFIELD C. J. What could be done more? the party searches at the Admiralty, and gets the last return made there. The man may have been captured and recaptured ten times over in the interval, or drowned, but how is the Plaintiff to know it? There was a stronger case of the insolvent man, *Crosby* v. *Percy*, *ante*, i. 364.

CHAMBRE J. And in the case there cited of *Cunliffe* v. *Sefton*, 2 *East*, 183. the inquiry was much slighter.

LAWRENCE J. What better search could be made than was made? A man is reported to be serving in the navy of *Great Britain*, which is now spread all over the globe. His own mother too was examined in this case, who was the person most likely to know where he was.

Rule refused.

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Jan. 24.

JAMESON *v.* SWINTON.

Upon nonpayment of a bill, notice thereof, given by an indorser living in *Holborn*, to an indorser living at *Islington*, by nine on the night of the day following the day on which the first indorser knew it, is reasonable notice.

BEST Serjt. moved for a rule *nisi* to set aside the verdict for the Plaintiff, which had been obtained upon the trial of this cause at the sittings after the last term before *Lawrence* J. The action was brought upon a bill of exchange. The defence was, that due notice had not been given of the dishonour of the bill, which took place on the 10th of *July*. At four in the afternoon of the same day, notice was given to *Elsham*, the last indorser, who lived at *Back Hill*, *Holborn*. On the 11th, about 8 or 9 at night, *Elsham* gave notice to *Swinton*, who lived at *Islington*. *Lawrence* J. was of opinion that *Elsham* gave the notice soon enough to enable him to recover against *Swinton*; and that if *Elsham* might recover against *Swinton*, *Jameson*, from whom *Elsham* had the bill, might also recover against *Swinton*. *Best* contended that the notice must be given within the hours of business, in the same manner as a bill must be presented for payment within those hours: but the court held that that rule prevailed only if a bill was accepted payable at a banker's, in which case it must be presented for payment within the hours of business, and refused the application.

Jan. 26.

MILLWOOD *v.* WALTER.

An erroneous date to a bill of particulars will not preclude the Plaintiff's demand, where the date cannot mislead.

BEST Serjt. moved to set aside the verdict obtained by the Plaintiff at the trial of this cause at the sittings at *Westminster* after the last term. The action was brought for the price of work done in colouring the outside of a house: the Plaintiff delivered under a Judge's order

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order a particular, in the margin of which was written *August*. The work was done in *May*, and therefore the Plaintiff, who was bound to abide by his particular, was not at liberty, he said, to give evidence of work done in *August*.

MANSFIELD C. J. The date in the margin must be left out, and considered as nothing. The bill of particulars must not be made the instrument of that injustice which it is intended to prevent. If there had been two demands, one for work done in *May*, the other for work done in *August*, there might have been some ground for the objection; but it would be too much to say that this particular is not sufficient.

Rule refused.

DEFARIA v. STURT. *Jan.* 26.

It is not necessary that the memorial of an annuity should set forth all the trusts of the annuity deed: it is sufficient if it appears by the memorial for whom any of the parties is trustee.

And the Court will not presume that a party is trustee for other persons than appears by the instruments laid before the Court.

It is not incumbent on the Plaintiff to disaffirm the existence of other trusts.

It is sufficient if a memorial sets out the trusts, so that the Court may judge for whom the party is trustee, without expressly stating who is the *cestui que trust*.

The memorial of an annuity recited a bond, warrant of attorney, and indenture of grant of an annuity charged on land, and that the grantor demised the land to a trustee in trust for better securing the payment of the annuity, with such powers and in such manner as were particularly expressed in the deed: the Court held that this was sufficient; for that it sufficiently expressed a trust for the grantee, and disaffirmed any trust for the grantor or other persons.

SHEPHERD Serjt. had in the last term obtained a rule *nisi*, that the judgment signed in this cause might be set aside, and that the bond, warrant of attorney, and indenture for securing to the Plaintiff a certain annuity of 400*l*., might be delivered up to be cancelled; he moved this as well upon objections appearing on the

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memorial, as upon an affidavit alleging some supposed irregularity in the mode of paying the consideration money: but as these objections were answered in point of fact, it is unnecessary to state them. The memorial was in substance as follows. A memorial to be registered pursuant to act of parliament, of a bond bearing date 22d *March* 1790, whereby *C. Sturt*, of *C.* Esq. became held and firmly bound to *M. de Faria*, of *L.* Esq. in the penal sum of 4800*l.*, with a condition thereunder written, reciting, that the Plaintiff had contracted with the Defendant for the purchase of one annuity of 400*l.* during the Defendant's life, for the price of 2400*l.*, which sum of 2400*l.* the Plaintiff had paid to the Defendant at or before the execution of the bond, and declaring, that if the Defendant should pay the Plaintiff yearly during the Defendant's natural life one annuity of 400*l.*, by four equal quarterly payments, on the 22d day of *June*, &c. in every year, without any deduction whatsoever, the first to be made on the 22d day of *June* then next ensuing, and also if the Defendant's executors should pay the Plaintiff, his executors, &c. in case the Defendant should happen to depart this life on any day on which the said annuity of 400*l.* was made payable, the whole quarterly payment thereof which should become due on that day, or if the Defendant should happen to depart this life on any other day, then a proportionable part according to the time which at his decease should have elapsed, of the quarterly payment of the same annuity growing due at the time of such decease, then the same obligation should be void, &c. And also of a warrant of attorney, bearing even date with the said bond, under the hand and seal of the Defendant, whereby he authorised *R. L.* and *J. H.*, attornies, &c. to confess a judgment against him the Defendant in the Court of Common Pleas, in an action of debt upon the said bond for 4800*l.* and costs. And

also

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also of an indenture, bearing even date with the said bond and warrant of attorney, and made between the Defendant of the first part, the Plaintiff of the second part, and *J. Hill*, of *L.* banker, of the third part, whereby the Defendant, in consideration of the said sum of 2400*l.*, to him paid by the Plaintiff, did give, grant, and confirm unto the Plaintiff, his executors, &c. during the Defendant's natural life, one annuity of 400*l.* to be yearly issuing, growing, payable, had, received, and taken by the Plaintiff, his executors, &c. by and out of all those manors, messuages, farms, lands, advowsons and other the hereditaments devised to the Defendant by the will of *H. S.* deceased, situate in the several parishes, &c. and all rights, rents, members, and appurtenances whatsoever to the said estates and premises appertaining, to hold, receive, and take the said annuity of 400*l.* unto the Plaintiff, his executors, &c. during the Defendant's natural life, to be paid and payable at the days and times in the said bond mentioned. And by the said indenture, the Defendant, for the further and better securing the payment of the said annuity of 400*l.* and in consideration of 10*s.* to him paid by *Hill*, did grant, bargain, sell, and demise unto *Hill*, his executors, &c. all those the manors, &c. and premises before charged with the payment of the said annuity of 400*l.* to hold the same to *Hill*, his executors, &c. from the day next before the day of the date thereof, for the term of 99 years, *in trust*, for the better securing the payment of the said annuity of 400*l.* *with such powers, and in such manner as are particularly mentioned, expressed, and declared concerning the same.*

Shepherd contended for the Defendant, that the annuity was void; first, because it was not sufficient that it might be collected from the memorial by inference for whom *Hill* was a trustee, but that the *cestui que trust* must be expressly named. Secondly, because it was ne-

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cessary either to set out all the trusts, so that the Court might see and judge for whom he was trustee, or otherwise expressly to disaffirm the existence of any other trusts except those which are particularly stated in the memorial.

Best and *Pell* Serjts. now shewed cause. Neither does it at all appear on the memorial, or on any pleadings, nor is it suggested by any affidavit, that *Hill* was by that deed constituted trustee for any other person than the annuitant: and the Court will not presume other trusts. The adjudged cases proceed no further than this, that when trusts appear on the deed, they must be noticed in the memorial. The words, "with the powers and in the manner therein mentioned," must be taken to refer to such powers as are adequate to the purpose of further securing the annuity for which the deed was made, namely, powers of entry and distress, for the benefit of the annuitant. And it is no objection that they are stated only by way of reference to another deed. In 9 *East*, 150., *Ocallaghan* v. *Ingleby*, where the same objection was raised, Lord *Ellenborough* C. J. expressly ruled this point: he says, "the objection that the memorial does not sufficiently set forth the powers of entry and distress, is answered by the fact of the memorial stating 'with powers of entry and distress as stated in the deed,' and the annuity act does not require such powers of entry and distress to be stated, except so far as they create a trust, which brings them within the branch of the act relative to trustees." It has never in any case been held that the memorial must state in words for whom the party is trustee; it is sufficient if either the *cestui que trust* be named, or the trust is so set forth, that the Court may judge for whom he is trustee. One trust only appears on this memorial, that *Hill* was trustee for the annuitant, and that trust is sufficiently plain from the whole purport

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of the deed, and needs not be more particularly expressed than it is; and as far as appears, he is trustee for no one else. The act does not require the trusts to be set out *totidem verbis*, and though indeed in cases where trusts have been stipulated favorable to the grantor of the annuity, it is extremely proper that the grantor should have the means to know them, because, as Lord *Kenyon* C. J. has said, and *Rooke* J., *Ex parte Ansell*, 1 *Bos. & Pull.* 62., they form a part of the consideration, yet it is not necessary any further to shew them, than so as to disclose the whole consideration; and in the present case it is not shewn that any such further trusts exist; therefore the first clause which respects the consideration has been complied with.

Shepherd in support of the rule. The memorial is not inconsistent with the fact of there being other trusts not disclosed, and the Plaintiff does not embrace the opportunity afforded him to discharge himself by affidavit of the presumption that other trusts subsist. It is incumbent on the Plaintiff to shew that there were no other trusts. In *Tolderry* v. *Allan*, 5 *T. R.* 480. the Plaintiff discharged himself by affidavit of the objection of other trusts, and the Court said, the objection "was answered by the fact, not now controverted, that there was no other trust but that set forth in the memorial." In 5 *T. R.* 641., *Denn*, *Lessee of Dollman*, v. *Dollman*, the annuity was held void, because there were trusts for other persons, as well as for securing the annuity, and the memorial only stated that the money was "paid in trust as therein mentioned." But the Court there say, "by referring to the deed it appears that *Griffith* was a trustee for *Toten*, and a trustee for other purposes after *Toten*'s annuity was satisfied." It is not enough to state that from which it may be inferred for whom *Hill* was trustee. In *Askew* v. *Macreth*, 1 *New Rep.* 215., it appeared by the strongest inference for

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whom *Coutts* was a trustee, for he is called in the beginning of the deed, a trustee nominated on the part of the Duke of *Queensbury* of the fifth part; but that was held insufficient. Secondly, it may be very material what are the powers which the grantee may enforce. He may have a bare power of entry and distress, or he may have a power to demise, and absolutely to oust the grantor; if these powers are fully set out, it will appear whether the grantor becomes entitled to the surplus of the money levied. In a case like this, where the deeds do not appear, a general reference to them in the memorial cannot be sufficient. In *Ex parte Ansell*, all the Judges held, that where an annuity is redeemable, the terms and conditions of redemption ought to be set forth in the memorial, in order that the grantor may, without being driven to any compulsory means, be apprized of those terms and conditions, and that it was not sufficient barely to refer to the deed, to which usually the grantor had no access. It may be, that the powers referred to in this case, enable the trustee to raise more than the bare annuity, perhaps to enter and receive the rents, to satisfy the annuity thereout, and pay over the residue, in which case he would, as to so much, be a trustee for the grantor as well as the grantee; and in that case if he is stated merely to be a trustee for the grantee, it falls directly within the case of *Askew* v. *Macreth*. [*Lawrence* J. In *Askew* v. *Macreth* it expressly appeared on the pleadings, that the deed contained other trusts than were set forth in the memorial; and the very first of them was, that *Coutts* should permit and suffer the grantor to receive the rents and profits till default should be made in the payment of the annuity.]

MANSFIELD C. J. This is an application made to the Court to set aside a judgment, on the ground, 1st, that the money was not paid as it ought; 2dly, on a defect of

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of the memorial. With respect to the payment of the money, the objection is not supported by the affidavits; and the only ground now to defeat the annuity is, that the memorial is not sufficient. The objection is founded on the statute 17 *Geo.* 3. *c.* 26. *s.* 1. which requires the memorial to contain the names of all the parties to the deed, and for whom any of them are trustees: and it is said, this memorial does not sufficiently state for whom *Hill* is trustee. Now every part of the memorial is material to be considered upon this objection. First, it states the bond, then the condition, which is, that the Plaintiff had contracted with the Defendant for the purchase of an annuity for the life of the Defendant, of 400*l.* by four equal quarterly payments in the year, without any deduction, a whole quarterly payment to be due if the Defendant dies on quarter day, and a proportionate part if he dies in the middle of a quarter. This is the manner in which it is payable. That is the bond; simply a bond for payment of an annuity in a particular *manner*. Having stated the bond, the memorial goes on to state the warrant of attorney; and then states the demise to *Hill*, by an indenture, which also contains a grant of the annuity of 400*l.* to be yearly issuing, growing, payable, had, received, and taken by and out of all those the manors therein described, to be paid and payable at the days and times in the said bond mentioned. This then was merely a grant of an annuity to be charged on the premises, and paid quarterly. It goes on to state, that in consideration of 10*s.* and for better securing the said annuity of 400*l.* the Defendant demised to *Hill* the said premises before charged with the payment of the annuity, to hold the same to *Hill* and his executors, &c. for the term of 99 years, in trust for the better securing the payment of the said annuity of 400*l.*, with such powers and in such manner as are particularly mentioned, expressed, and declared concerning the same. This is the substance of

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of the memorial; and the objection is, that this does not sufficiently express for whom *Hill* is trustee. Now leaving all the cases and arguments about this unfortunate act out of the case, let any one having read this deed be asked for whom *Hill* is trustee? No man living, in his senses, could hesitate to say he was trustee for the Plaintiff, as far as appears on this memorial. But it is urged, that it is not expressly said that he is a trustee for no other person. If that had been put in, it would have been clearly complete. But there are the words "with the powers and in the manner therein mentioned:" what do they mean? They probably refer to powers of entry and distress; but the act says nothing about stating powers in the memorial; "manner" probably refers to the mode of payment mentioned in the bond. Nor does the act say, that the trusts shall be set out; not a word of that. The act certainly seems to have been made under an impression, that to purchase an annuity was immoral; but the act only requires that it should appear for whom the party is a trustee. And it does appear he is trustee for the Plaintiff. I am therefore at a loss to see on what ground we can set aside this judgment, without going much farther than the Court hath hitherto done. If the act were now to be passed, and the Courts could foresee what has been the consequence of their decisions, it would probably receive a very different construction. *Denn, Lessee of Dollman*, v. *Dollman*, was a very strong case: it there appeared there were trusts, and the Court said, you have not told us what the trusts were. In *Tolderry* v. *Allan*, the memorial itself furnished a ground to surmise that there were trusts for another. *Askew* v. *Macreth* was a case quite of a different sort from this.

LAWRENCE J. I am of the same opinion. There are two objections: 1st. that it must appear clearly, and not

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by inference, for whom *Hill* is trustee. As to that, no man, who had never read this act, could doubt a moment that *Hill* was trustee for the Plaintiff, and for no one else; for it states the bond, the warrant of attorney, and the demise for more certainly securing the payment of the said annuity; to whom was it to be paid, but to the Plaintiff? for whom then was *Hill* trustee, but for the Plaintiff? It seems to me to be stated not by inference, but positively, that he is trustee for the Plaintiff. As to the second objection, the act does not require the memorial to disaffirm all other trusts. As to the case of *Toldervy* v. *Allan*, the memorial stated first certain trusts, and a further trust for securing the annuity, and it did not appear for whom the first trust was; but here only this trust appears, and it is shewn for whom it subsists.

CHAMBRE J. The act only requires the memorial to state for whom the party is trustee, not the trust. It seems as if in the case of *Dollman* v. *Dollman*, it had been considered by the Court, that it was necessary to state the trusts: that must have been mere inadvertence in the Court, in the language they used, not adverting to the words of the act. As to the case of *Toldervy* v. *Allan*, it does not appear that the Court required an affidavit to be made by the Plaintiff denying the trust; perhaps the party chose that line of defence; and if so, why should the Court look further? As to *Askew* v. *Macreth*, it might well be presumed, from its being said that he was nominated by the Duke of *Queensbury*, the grantee, that he was trustee for the duke; but the decision does not rest on the point, that the Court could not presume that; for there it positively appeared that there was a trust for the grantor, which was not stated. Therefore it does not impugn any of the decided cases, to determine that the pre-

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sent memorial is quite sufficient; and I am of opinion that the rule ought to be

Discharged (*a*).

Feb. 8.

(*a*) Defaria *v.* Sturt.

A similar motion was made in the Court of Exchequer, and a rule *nisi* obtained by *Runnington*, to set aside the annuity on the same objection. *Best* Serjt. and *Gaselee* shewed cause, and *Pell* Serjt. and *Runnington* supported the rule. They strongly insisted on the cases of *Denn, on the Demise of Dollman*, v. *Dollman*; *Askew* v. *Macreth*; and *Tolderry* v. *Allan*. They observed that in all similar deeds the object of the trusts was for better securing the annuity; therefore this case was not, on that ground, distinguishable from others.

Macdonald C. B. In *Askew* v. *Macreth*, *Coutts* was trustee for two; and the objection was, that the deed did not sufficiently discriminate that he was trustee for two. Here there is but this one single trust for payment of the annuity, and that appears to be for the annuitant, and then the trust ceases.

Graham B. Nothing appears here but this single trust.

Rule discharged.

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HENDERSON and Another *v.* The Countess of GLENCAIRN.

Jan. 26.

An annuity bond was assigned to secure another annuity of less amount: the Court held that the second annuitant was not bound to enrol a memorial of the first bond.

SHEPHERD Serjt. had in *Michaelmas* term last obtained a rule *nisi* for setting aside the judgment and execution in this cause, and restoring the money levied, and for delivering up the warrant of attorney upon which the judgment was signed, to the Defendant, to be cancelled. These were the securities given for payment of an annuity; and the circumstances were, as it appeared by the Defendant's affidavit, that *Andrew Hamilton*, Esq. by his bond, bearing date the 1st *Sept.* 1781, bound himself, his heirs, executors, and administrators, to the Defendant in 6000*l.*, with condition for the payment to the Defendant and her assigns of an annuity of 300*l.*, by quarterly payments during the Defendant's life. The Defendant had sometime afterwards granted an annuity of 100*l.* a year to a person named *Millward*, and for a collateral security had assigned to him Mr. *Hamilton's* bond. She afterwards granted to the Plaintiff another annuity of the like amount, and for security she executed to him also a second assignment of the same bond. By the original memorial of the bond of *Hamilton*, it did not appear that he bound his heirs, executors, and administrators, or any of them, for the payment of the annuity of 300*l.*, and the Plaintiff's memorial contained the same defective description. Upon this objection, fortified by the cases of *Horwood* v. *Underhill*, 10 *East*, 123. and *Denne* v. *Dupuis*, 11 *East*, 134. *Shepherd* obtained his rule.

Best and *Vaughan* Serjts. now shewed cause. This case is materially distinguishable; the objection made does not apply

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apply to the bond given by the Defendant, but to the bond given by *Hamilton* to the Defendant: this case coincides with that of *Ocallaghan* v. *Ingleby*, 9 *East*, 135. where it was held unnecessary to enrol a memorial of a conveyance in trust to raise money by the grant of annuities for the life of the lessor: the bond of *Hamilton* is similar to that trust deed: it is the instrument which conveys to the Defendant the property on which she afterwards raises the Plaintiff's annuity. This bond is not, any more than that deed was, an instrument by which the annuity is granted. When this annuity was granted to the Plaintiff, he was not in a condition to enrol a memorial of *Hamilton*'s bond; for he could not see it, because it was in the hands of *Millward*: the Plaintiff could obtain the description of the bond only from the memorial of the former annuity; and it is therein described as merely a personal bond. No memorial at all of *Hamilton's* bond was requisite to complete the Plaintiff's title; and, since no memorial is necessary, a defective or a vitious memorial will not hurt.

Shepherd, *contrà*. It is not sufficient to have a memorial of the deed only by which the annuity is granted: it is sufficient to set out the consideration of that deed only; but all the deeds by which the annuity is in any way secured must be included in the memorial.

MANSFIELD C. J. Every deed must be included in the memorial by which the grantor secures the annuity. But this bond is no assurance of the annuity; it assures the property on which the annuity is secured.

LAWRENCE J. The enrolment must be within twenty days after the execution of the instrument: how can the Plaintiff, taking an annuity in 1803, enrol, within twenty days after the execution, a bond given in 1781?

Rule discharged.

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PURLING *v.* PARKHURST.

Jan. 26.

If a memorial of an annuity recites a bond binding the obligor and his heirs, as a bond merely binding himself, it is not cured by reciting the condition to be for payment by the heirs of the obligor.

IN this case an annuity bond bound the Defendant, his *heirs, executors, and administrators*: the memorial stated it as a bond binding only *himself*; and *Shepherd* Serjt. having obtained a rule *nisi* to set aside the judgment, *Best* Serjt. endeavoured to distinguish this case from *Denne* v. *Dupuis*, 11 *East*, 135. and *Horwood* v. *Underhill*, 10 *East*, 123. because the memorial recited the bond to be conditioned for the payment of the annuity by the obligor, his *heirs, executors or administrators*.

MANSFIELD C. J. He might equally have conditioned that the bond should be void on payment by the heirs of another man. That condition does not bind his heirs.

Rule absolute.

RHIND *v.* WILKINSON.

Jan. 27.

If a licence to trade is lost, the next best evidence is the register of it in the books of the secretary of state.

An averment of interest at the time of effecting the policy is immaterial, and need not be proved; it is sufficient if the Plaintiff be interested at the commencement of the risk.

An *American*, who is owner of a ship only as trustee, and would not thereby be entitled to the privileges of the *American* flag under the laws of his own country, has a sufficient interest to maintain an action on a policy.

THIS was an action brought upon two policies of insurance. The first was a policy effected on the 21st of *June* 1807, by *Berthon* and sons, upon the ship *Alert*, valued at 1800*l.*, at and from *London* to *Malta*, *Zante*, and *Cephalonia*, either or both, with liberty to take in goods at *Falmouth*, and to touch at *Patross*, and to load

there

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there if deemed advisable, at a premium of twenty guineas *per cent.*, to return 4*l.* *per cent.* if the ship should sail with convoy bound to *Gibraltar*, and 4*l.* *per cent.* more if she sailed with convoy from *Gibraltar* to *Malta*. The second was a policy effected on the 14th of *Sept.* 1808, by the same persons, as agents, upon the freight of the same ship, at and from *Patross*, *Zante*, and *Cephalonia*, or *Cephalonia* and *Zante*, and *Patross*, all or any one or more of those ports, to the ship's port or ports of discharge in *Great Britain*, with liberty to touch at *Malta*, and to touch at *Falmouth* for orders, at a premium of fourteen guineas *per cent.*, to return 50*s.* *per cent.* if the ship sailed with convoy from *Malta*, and 50*s.* *per cent.* more if she sailed with convoy from *Gibraltar*. The declaration alleged, that at the respective times of effecting the policies, and of the loss, the Plaintiff was interested in the ship and freight respectively. Upon the trial of this cause at *Guildhall*, at the sittings after last *Michaelmas* term, before *Mansfield* C. J., it appeared that the ship sailed from *London* with convoy for *Gibraltar*, and thence with convoy for *Malta*; on her arrival at *Zante* she was captured by the *French*, who were then in possession of that island; as soon as this capture was known in *England*, which was on the 2d of *Feb.* 1809, the Plaintiff gave notice of abandonment to all the underwriters, but it did not appear that the underwriters ever agreed to the abandonment, and nothing was done thereon. The master of the vessel, through the agency of a friend, ransomed the ship from the *French* for 1000*l.*, and took in a homeward cargo; he sailed in *Dec.* 1808, for *Malta*, and from *Malta* with convoy for *Gibraltar*; and on the homeward voyage from the last place, the ship was run down and totally lost. The cargo was *British*, but the ship had belonged to *Mason*, an *American*, and was by him transferred to the Plaintiff, who was also an *American*, under a power of attorney given by *Mason* to *Ber-*

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thon the agent. A chancellor in the office of the *American* consul here, swore, that the Plaintiff in *July* 1808, and not before, appeared before the consul, and took the oath of ownership required by the laws of *America* for the vesting a title to a ship in the purchaser; he also swore, that if it had been known that *Rhind* was a trustee only, the consul would not have permitted him to take that oath, the *American* laws requiring that it should be made by the person having the beneficial interest; and in this case it was contended that a person named *Meade* was the beneficial owner. He was an *Englishman*, and by the laws of *America* could not in his own person acquire the privileges of the *American* flag: but it appeared that he had advanced a considerable sum of money on the security of the ship, and that *Rhind* was a trustee for him. *Mansfield* C. J. thought that there was not evidence to shew that the legal interest was not in the Plaintiff, and if the legal interest were in the Plaintiff, it was not necessary to take into consideration what the law of *America* might be, and that the interest proved was sufficient for the purposes of this action. Nevertheless he reserved the point. The Plaintiff's right to recover any return of premium for having sailed with convoy was questioned, on the ground that the ship had never arrived; and a broker gave evidence that it was the universally received practice on similar policies, that the vessel must arrive in order to entitle the assured to a return for convoy: it was observed, however, that the words "and arrives," which are usually inserted in policies, were wanting in this case. To render either the outward or the homeward voyage legal, it was also necessary that there should be a licence from the king in council; the master of the ship swore that there was a licence, and that it was taken out by *Price* and sons, brokers, for *British* merchants, but that it had perished with the ship. He then proceeded to give parol evidence of the contents, and stated that it

was

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was a licence for a voyage to *Zante*, or any islands of *Turkey*, and back to any *neutral port*. For the Defendants it was objected, that in the books of the secretary of state it would appear what the licence was, and that the entries in those books were better evidence, and ought to be produced, or their absence accounted for, before parol testimony could be admitted of the contents. *Mansfield* C. J. thought that *Price* and sons, the brokers who obtained the licence, were the most competent witnesses to give evidence of the contents of it, and he also recollected that on former occasions, evidence of the contents of lost licences had been given from the council books: he therefore directed the jury to find for the Plaintiff, subject to these questions, and they gave their verdict for the return of premium on the convoys to *Gibraltar* and to *Zante*, for a loss of 33*l. per cent.* on the outward voyage, and a total loss on the homeward voyage, and the return of premium for convoy on the homeward voyage.

Lens Serjt., in *Michaelmas* term last, moved to enter a nonsuit upon four objections. First, that it was alleged in the declaration that the Plaintiff was interested at the time of effecting the policy, whereas his interest, such as it was, did not commence till long after the date of the policy. 2dly, That upon the testimony of the officer of the *American* consul, it appeared that *Rhind*'s interest was at no time sufficient to support the averment of interest in him. 3dly, That the ship having been abandoned to the underwriters, the Plaintiff had no interest in her during any part of the homeward voyage, and consequently no interest in the freight. Lastly, that the best evidence which could be obtained of the existence and contents of a licence, had not been produced.

Best

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Best and *Shepherd* Serjt. in the last term shewed cause against the rule. They contended, 1. that they were entitled to recover either the ransom paid for the ship, or the entire premium paid on the homeward voyage: for if the abandonment was effective, the Plaintiff had no interest in the homeward freight; and therefore the risk never attached. But if the abandonment was ineffectual, as they insisted it was, then the Plaintiff was entitled to recover as for a total loss of the freight on the homeward voyage. As to the licence, no rule of law bound the Court officially to notice that any register or copy of it existed, and no proof was given that any such was to be found; the Court would not establish as a general rule of law, that that evidence was necessary to be given, which could only be exhibited in causes tried in *London*; for the privy council would not permit their books, containing the minutes of their proceedings, to be carried elsewhere: therefore, as far as appeared, the parol evidence was the best evidence of the contents that could be produced. As to the Plaintiff's interest, this being foreign property, the policy was not, within the first section of the 19 *G.* 2. *c.* 37., the property of his majesty's subjects, and consequently no proof of interest was necessary: and although interest was averred, yet the averment being wholly immaterial, needed not to be proved: if, however, interest were necessary, and if the Plaintiff had not the absolute property in the ship, yet he had a sufficient insurable interest, inasmuch as he had the disposition and government of the ship, which, in *Robertson* v. *French*, 4 *East*, 130. was held sufficient to enable a Plaintiff to recover against underwriters. If he was sufficiently interested, he had a right to recover the ransom, and the two returns of premium for convoy from *London* to *Gibraltar*, and from *Gibraltar* to *Malta*, which were not conditional on the ship's arrival, as is usually the case: for the abandonment being made under

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ignorance of a recapture, which had before that time actually taken place, was of no effect, according to *Bainbridge* v. *Neilson*, 10 *East*, 329. And the Plaintiff was also entitled to recover a total loss of the homeward freight, and one return of premium on the homeward voyage, for sailing with convoy from *Malta* to *Gibraltar*. If the underwriters insist on the abandonment, they must necessarily thereby admit the Plaintiff's interest on the outward voyage, in which case he must recover a total loss on the first policy. But that is not the true view of the subject; and the verdict, as it now stands, must be supported.

Lens and *Marshall* Serjts. in support of the rule, in this term, insisted, as to the interest, that the possession and disposition of the ship being explained to be founded on a defective title, the Plaintiff had no insurable interest: but even if he was a sufficient owner in *July*, he was not, as the declaration averred, owner when the ship sailed; and since he has alleged it, he must prove the fact as it is alleged. As to the licence, it does not stand on the same ground as any private writing, for it is an instrument of a public nature; and it, besides, expressly requires, that the person who would render it available, shall assume the burthen of proving its existence and terms (*a*). The Plaintiff ought therefore to have shewn, that upon diligent search he could find in the council books no trace or memorandum of such a licence.

The Court held, as to the time of the commencement of the Plaintiff's interest, that if the declaration had averred that he was interested at the time of the ship's sailing, or that the policy was made on a certain day,

(*a*) See *Feise* v. *Waters*, *post*, 248.

and

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and that afterwards on a subsequent day the Plaintiff acquired an interest, it would have sufficed, and if that would have been good, the allegation of interest at the time of effecting the policy was an immaterial allegation, and needed not to be proved. It was immaterial to aver interest at any day previous to the commencement of the risk. It is every day's practice to insure goods on a return voyage, long before the goods are bought. As to the licence, there must necessarily be a record of it in the secretary of state's office, and even if the first policy was effected before the passing of the statute 48 *Geo. 3. c.* 126. *s.* 2. throwing on the secretary of state the office of signing licences, which received the royal assent on the 30th *June* 1808, yet if the licence were under the sign manual, there was doubtless some register of it somewhere preserved; it was highly probable too that *Price* had a copy, and therefore the Court could not say that the parol evidence was the best evidence that could be obtained, and the rule for a nonsuit must consequently be made

Absolute.

DOWNES *v.* WITHERINGTON.

Jan. 28.

A Defendant who complains of irregularity in process, must, if he has an opportunity, apply to have it set aside before the Plaintiff has taken any further step in the cause.

THE Plaintiff in this case had proceeded by summons, and had sued out two writs of *distringas*, and levied issues on them. The Defendant was an illiterate woman, who kept a chandler's shop at *Highgate*, and she had employed no attorney in the cause until immediately before the time of this application, made by *Shepherd* Serjt. to the Court, to set aside the several writs of *distringas*, and restore the levies, on account of a palpable irregularity in the first process, the notice at the foot of the summons being in blank, and not addressed to the Defendant, nor

dated.

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dated. The summons was served on the 11th of *November*; the service of the first *distringas* and levy was on the 23d: *Michaelmas* term ended on the 26th; and the second levy was on the 28th. The Defendant on the 20th of *January* gave notice of this motion for the first day of *Hilary* term. The Court granted a rule *nisi*.

Manley Serjt. shewed cause, and *Shepherd* supported the rule, and the question was agreed to be, whether a Defendant may at all times apply to set aside irregular process, whatsoever progress the Plaintiff may have made, provided that the Defendant has not himself appeared, or taken any step in the cause; or whether he is bound to point out the irregularity before the Plaintiff has incurred any further expence by ulterior proceedings. The Court at first inclined to think that the case of this poor ignorant woman, who had employed no attorney, was distinguishable from the case where an attorney was employed, who ought to use due diligence in watching the cause; and they permitted the matter to stand over, that the Defendant's counsel might search for authorities: on the following day *Manley* cited *Fox* v. *Money*, 1 *Bos. & Pull.* 250. and *Dargent* v. *Vivant*, 1 *East*, 331. [The Court observed, that all the cases cited in that judgment, were cases where the Defendant had taken some step, but here the Defendant had done nothing; and *Petrie* v. *White*, 3 *T. R.* 5. and *Gear* v. *Goodwin*, 2 *Smith*. 491. were more in point.] *Shepherd* cited *Pearson* v. *Rawlins*, 1 *East*, 77. where, from the language of Lord *Kenyon* C. J. it might be implied, that so long as a Defendant did nothing, he did not waive the irregularity.

MANSFIELD C. J. This is a motion to set aside these two writs of *distringas*, which certainly would be set aside for irregularity, if the party had come in time, because the summons on which they issued was not a proper

summons;

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summons; the Plaintiff says they ought not to be set aside, because if the Defendant meant to avail herself of the irregularity of the summons, she ought to have applied to the Court immediately. The answer made is, that although that is the rule in the case of other proceedings, it is not so in the case of process. Now some of the cases cited certainly are cases of affidavits to hold to bail, which are process; and one does not see why the rule should not equally apply to the different stages of process, as to all the other different proceedings in a cause; and if that be so, the first summons gives the Defendant all the notice necessary, and the first *distringas* being served on the 23d of *November*, four days before the end of the term, it gave the Defendant sufficient time to apply to the Court to set it aside. Consequently by the Defendant's delay, the Plaintiff is put to more expence in suing out another writ of *distringas*, which he would not have incurred if the Defendant had come here within the four last days of *Michaelmas* term, as she might have done. And it is the opinion of the other judges, and it seems the best ground to decide on, that the Defendant has come too late, and therefore the

Rule must be discharged.

1810.



Jan. 28.

LINGING *v.* COMYN.

If a Plaintiff, after judgment obtained, proves his debt under a commission of bankrupt sued out against the Defendant, and also proceeds against the bail, the bail are thereby entitled to their discharge under 49 *Geo.* 3. c. 121. *s.* 14.

And the Court will discharge them on motion.

THE Plaintiff having commenced this action in the last *Easter* vacation, the Defendant perfected his bail in *Trinity* term. The Plaintiff soon after signed judgment for want of a plea. On the 20th of *Sept.* a commission issued against the Defendant, and he was declared a bankrupt: the Plaintiff proved his debt under the commission on the 7th of *Nov.* last: he also, on the 21st of *Nov.* sued out a writ of *capias ad satisfaciendum*, on which the sheriff on the 28th of *Nov.* returned *non est inventus*. The Plaintiff then proceeded by *scire facias* against the bail. The Defendant obtained his certificate on the 8th of *Dec.* following, which, however, his creditors signed in blank, so that it did not even now appear to have the Defendant's name in it. *Shepherd* Serjt. had obtained a rule *nisi* to set aside the proceedings against the bail, and enter an *exoneretur* on the bail-piece, on two grounds; first, that by the bankruptcy and certificate, the bail were discharged: secondly, that the Defendant having proved his debt, had made his election to proceed under the commission, and was concluded by the statute 49 *Geo.* 3. *c.* 121. *s.* 14. to proceed at law.

Best Serjt. now shewed cause. As to the first objection, although by the practice of this court, the bail have time to discharge themselves by surrendering their principal, until the return of the first process issued against the bail, that is all matter of favour and not of right. The bail are fixed upon the return of the *capias ad satisfaciendum*, and it is at their peril whether they can afterwards by an actual render discharge themselves; and if by intervening events the render becomes impossible, the bail are absolutely liable. *Tymperley* v. *Coleman*, *Cro. Jac.*

Jac. 165., so held upon the death of the Defendant. *Glyn* v. *Yates*, 1 *Str.* 511. acc. *Wolley* v. *Cobbe*, 1 *Burr.* 244. The Court agreed, that if the certificate be obtained before the bail are fixed, they are discharged; but if they are fixed before the certificate is obtained, they remain liable. The very terms of the recognizance indeed shew it, without having recourse to authority; for the condition is, that the principal shall appear at the return of the *capias ad satisfaciendum*. However, *Parry* v. *Berry*, 2 Ld. *Ray*, 1452. and *Filewood* v. *Popplewell*, 2 *Wils.* 67. are to the same effect. The certificate too is void, because the Defendant is not therein mentioned; and whether this could or not be corrected upon an application to the great seal, the omission is fatal as it now stands. 2dly, The bail are not discharged by reason of the stat. 49 *Geo.* 3. *c.* 121. *s.* 14., which enacts that no creditor who has or shall have brought any action shall prove a debt under the commission for any purpose whatever, without relinquishing such action; for the Plaintiff did not prove under the commission till the 7th of *Nov.* and he had long before that time obtained final judgment, which put an end to the action, so that no action was pending, to be relinquished: and moreover the proving the debt under the commission was in aid of the bail, and not in discharge of them.

Shepherd, contrà. All the cases cited on the first ground are misapplied. They have all been cases where the *capias ad satisfaciendum* has not been returnable until after the certificate was obtained; now here the *capias ad satisfaciendum* was returnable before the certificate was obtained, and therefore the liability of the bail was extinguished by the certificate. *Ray* v. *Hussey*, *Barnes*, 104.

The Court, without expressing any opinion upon this point, were clear that the effect of the statute was, that after the Plaintiff had proved under the commission, he

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could not take the Defendant in execution; and the bail were only liable in case the Plaintiff, being entitled by his judgment to take the defendant on a *capias ad satisfaciendum*, should be unable so to do. This act was made in favour of bankrupts; but if the Plaintiff's construction should prevail, it would not have the proposed effect, for the bankrupt would become liable at the suit of the bail for the money which the bail should pay. The action became complete by judgment; but it was not thereby at an end, otherwise the Plaintiff, by his own argument, could have no writ of execution; for a writ of execution is process in the action, and is "a benefit thereby," which the Plaintiff is called on by the act to relinquish. The consequence is, that by proving under the commission, the Plaintiff has relinquished his action, and if he has so done, the *capias ad satisfaciendum* is a mere piece of waste paper; and consequently, the bail are not answerable for the appearance of their principal at the return thereof, and therefore are not fixed.

Rule absolute.

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FEISE v. WATERS.

Under a licence to *A.* to import goods, the property of *A.*, as specified in his bills of lading, if the goods be consigned to others with particular bills of lading, a general bill of lading signed to *A.* without proof of some special interest in *A.* in the goods, will not entitle the consignment to the benefit of the licence.

Otherwise, if *A.* had had a special property in the goods.

THIS was an action brought to recover an average loss upon a policy effected upon goods at and from *Amsterdam* to *London*, and the interest was averred to be

in

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in the Plaintiff. Upon the trial of this cause at *Guildhall*, at the sittings after last *Trinity* term, before *Mansfield* C. J., the Plaintiff produced the King's licence, which permitted "*T. Baker* and sons, on board of six neutral "ships, the names of which they were unable to set forth, "to import from any port in *Holland*, such goods of the "sorts therein enumerated, *being the property of the said* "Thomas Baker *and sons, as might be specified in their* "*bills of lading*. Provided that any who should claim "the benefit of that licence should have the same on con-"dition, that if any question should arise in any of his "majesty's courts of admiralty or elsewhere, whether "such person had in all points conformed thereto, in all "cases whatsoever the proof should be on the person "using that licence, or claiming the benefit thereof." And in the margin was written, "*Thos. Baker* and sons, "licence to import." *Baker*, who was the ship's broker, proved that he was in the constant habit of taking out in his own name, and in a similar form, licences for all persons on whose behalf he acted; that he appropriated the licence produced, to the ship which brought home this cargo, as one of the six which were to be protected by it, and that the Plaintiff repaid his proportion of the fees paid for obtaining it at the secretary of state's office. He also proved that he was not interested in the goods, but it appeared that the consignees had on the same day, the 20th *Nov.* 1804, signed a general bill of lading to *Baker* of all the goods on board the ship, and particular bills of lading to the particular consignees. The Chief Justice thought this was not a sufficient property in *Baker* to enable him to apply the licence to this cargo, and directed a nonsuit, reserving the point.

Shepherd Serjt. in *Michaelmas* term obtained a rule *nisi*, that the nonsuit might be set aside, and a verdict entered

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entered for the Plaintiff, with 40*s*. damages, that amount having been ascertained at the trial.

Best and *Marshall* Serjts. now shewed cause. The nonsuit is clearly right; for if the property is in the Plaintiff, the licence to *Baker* will not make the voyage legal; if the interest is in *Baker*, the averment of interest in the Plaintiff is not proved, which is a fatal variance. This is materially distinguishable from the case of *Defflis* v. *Parry*, 3 *Bos. & Pull.* 3. where the licence was, "to Messrs. *Bridge* and *Smith*, or their agents, or the bearers of their bills of lading." This point has in effect been decided in the former case, which arose on this same policy. *Feise* v. *Thompson*, *ante*, i. 121.

Shepherd and *Vaughan* Serjts. *contrà*. All the judicial comment on the language of these instruments has leaned to the more liberal construction. In *Defflis* v. *Parry*, Lord *Alvanley* thought it was the intention of government in granting the licence to authorize that sort of importation. In *Feise* v. *Thompson* the Court did not prejudge the point, but left it to be now decided. This case would wholly coincide in circumstances with that of *Defflis* v. *Parry*, but for the words here inserted, "being the property of *T. Baker* and sons;" but since those words are coupled with the qualification, "as may be specified in their bills of lading," it is plain that the intent was, that the goods might be lawfully imported, if they were so far recognized to be *Baker*'s goods as to be included in his bill of lading. One reason of signing a general and a particular bill of lading, often is this: that the general consignee, who is agent of the consignor, may have the power of stopping the goods *in transitu*, unless they are paid for, and this is a sufficient degree of property in the general consignee for the purposes of this licence. It

little

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little differs from the case of a consignment to a broker to sell on commission, on which there could be no question but that the consignee would have a sufficient property in the goods. Any qualified or conditional property which may pass under bills of lading is sufficient to satisfy this licence. It is not so much personal, as a licence for particular sorts of goods. The mere production of the general bill of lading shewed a *primâ facie* title to the goods in *Baker*.

MANSFIELD C. J. It is admitted on the Plaintiff's part that *Baker* had no interest: he was a mere broker, he had absolutely been paid for the licence. The goods were never destined to be delivered to *Baker*: they were to go immediately from the captain of the ship to the particular consignees. The general bill of sale is not sent to *Baker* for the protection of the merchant abroad, nor is *Baker* in the least degree responsible to him for the goods. If any qualified interest had been consigned to *Baker*, it might be different: but if that had been the intent, the consignor would never have sent absolute bills of lading to the particular consignees. It appears that since the time of *Defflis* v. *Parry*, the officers of government have found some reason to restrain the generality of their licences. Do not consider the matter as absolutely closed; but as we are at present advised, we think the licence does not protect the goods; unless therefore we say any thing further on the subject, the rule must be discharged.

CHAMBRE J. The licence in *Defflis* v. *Parry* said nothing at all about the property. When the government changed the form of their licence, does it not shew that there was a change in their policy? and is it not fit that the Court should support that policy? Their rule is evidently stricter now than it formerly was, or they would

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would not otherwise have adopted the alteration in the form of the licence.

The Court never made any further mention of this case, and the rule was made

Absolute.

Jan. 31.

POPE v. DAVIS.

In an action on the statute 1 & 2 *Ph.* & *M.* c. 12. for driving a distress out of the hundred into another county, the venue may be of either county.

KENT to wit. The Plaintiff in his second count declared on the statute 1 & 2 *Ph.* & *M.* c. 12. that the Defendant on the 8th day of *July*, in the hundred of *Blackheath*, in the county of *Kent*, distrained a heifer of the Plaintiff's, in the name of a distress for certain damages then and there supposed to have been done in a certain close of the Defendant in the said hundred of *Blackheath*, yet that the Defendant not regarding the statute, &c., drove the same distress out of the said hundred, and out of the said county of *Kent*, in which the said distress was so taken, into a certain other hundred, and into a certain other county, (to wit,) into the hundred, or first division, of *East Brixton*, in the county of *Surrey*, to a pound in a certain place called *Peckham-lane*, in that county, in contempt, &c. Upon the trial of this cause at the *Kent* summer assizes 1809, before Lord *Ellenborough* C. J. the facts being proved as stated in the declaration, his Lordship conceived that the offence was committed in *Surrey*, and that the venue was laid in the wrong county, and directed a nonsuit; which *Shepherd* Serjt. in *Michaelmas* term obtained a rule *nisi* to set aside, upon the ground that the boundaries of the hundred and of the county were in this case the same, and that since a man who drives cattle, goes behind them, it necessarily followed that at the moment when the

Defendant

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Defendant had first propelled the heifer into another county, and had completed the offence, which by the statute is defined to be the driving her out of the hundred, he himself must still have continued in the county wherein he took her.

Best Serjt. in this term shewed cause against this rule. He argued that the offence was not complete but by impounding the distress in another shire.

Shepherd supported his rule.

LAWRENCE J. In *Gybbin*'s case, *Cro. El.* 646. it was held that the *venire facias* ought to have been of both counties, because the tort consists of two parts, and now by the statute it may be tried in either county.

Rule absolute.

HEATH J. was absent.

NELSON v. OGLE.

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Security for costs is not required of a foreigner, a captain of a ship who is in the habit of sailing to and from the ports of this country.

BEST Serjt. had obtained a rule *nisi* that the Plaintiff might give security for costs, upon an affidavit that he was a native of *Denmark* or *Sweden*, that it could not be discovered that he had any fixed place of abode, that he was a seafaring man, and employed by different ship-owners in navigating their ships, and was never resident in any particular place longer than while his ship was detained at any port she might put into, or in case of his discharge from one ship, until he met with another; and that he was now on the point of leaving the kingdom.

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Vaughan Serjt. shewed cause; and *Best* supported the rule.

The Court held that the Plaintiff's case was not distinguishable from that of an *English* sailor; he was in the habit of coming backwards and forwards, and the Defendant must catch him while he was in port.

Rule discharged.

SOUTH, Assignee of the Sheriff of SURREY, *v.* TANNER and JONES.

Jan. 31.

If the Plaintiff shew on his declaration in debt on bond against two, that the bond is executed by three, it is good matter of plea in abatement,

Or in arrest of judgment,

But is no ground of nonsuit on the plea of *non est factum*.

THIS was an action on a replevin bond; the declaration stated the distress levied by the Plaintiff for rent arrear, and the tenant's plaint to the sheriff; and that thereupon the sheriff, according to the form of the statute, did take from *John Carey*, *Nathaniel Tanner*, and *James Jones* (the said *Nathaniel* and *James Jones*, being then two responsible sureties,) a bond in double the value of the goods, &c.; by which said bond, the said *Nathaniel* and *James*, on, &c. (the same writing obligatory being signed with their respective seals,) did acknowledge themselves to be bound to *James Mangles* the sheriff, in 100*l.* The Plaintiff then proceeded to shew the condition, forfeiture, and assignment of the bond, and averred that by means thereof, and by force of the statute, an action had accrued to the Plaintiff to demand and have *of the two Defendants* the sum of 100*l.* above demanded, with a *profert*. The Defendant craved *oyer*, upon which it appeared,—that *John Carey*, *Nathaniel Tanner*, and *James Jones* were thereby held and firmly bound unto *James Mangles*, Esq, sheriff of the county of *Surrey*, in 100*l.*; whereupon the two Defendants pleaded that the said supposed writing obligatory was *not their deed*, *nor*

the

the deed of either of them; and upon this issue was the cause tried at the *Croydon* Summer Assizes 1809, before *Lord Ellenborough* C. J.: when his Lordship was of opinion that the bond which was set out, and proved, did not support the issue for the Plaintiff, and directed a nonsuit.

Best Serjt. in *Michaelmas* term obtained a rule *nisi* to set aside the nonsuit, and have a new trial.

Shepherd and *Manley* Serjts. now shewed cause. Advantage may be taken of the objection upon the plea of *non est factum*, and it is not necessary for the Defendant to plead in abatement: for it is absurd to say the Defendant shall give the Plaintiff a better writ, when the Plaintiff shews on his own declaration that he ought to have taken a better writ. Therefore *Whelpdale*'s case, 5 *Co.* 119. and the other cases of that class are not in point. This bond was the deed of all, but it was not the deed of these two only, for they never executed any bond by which these two only were jointly bound. *Gordon* v. *Austen*, 4 *T. R.* 611. is in point: there one of three parties to a promissory note, was allowed upon the general issue to take the benefit of two others being joined in the note, one of whom was not named. [*Lawrence* J. That was a case of misnomer of one of the parties to the note, and consequently there was a variance in the proof of the instrument described. Was not this point decided in the case of *Gaulton* v. *Challiner* and *Wilkinson*, 1 *William's Saunders*, 291. *f. note?* It was there determined that if two only of three co-obligors be sued, it is no ground of nonsuit, but goes in arrest of judgment.] Where it appears on the face of the record that there are other parties to the bond who are not sued, advantage may be taken of it upon the trial. *Rice* v. *Shute*, 5 *Burr.* 2614., *Aston* J. cited a case of *Horner* v. *Moor*, where it was held that all must be joined.

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joined. [*Lawrence* J. In that case the issue of *non est factum* was found against the Defendants, and the objection was made in arrest of judgment.] *Streatfield* v. *Halliday*, 3 *T. R.* 779. *Buller* J. says, if three be bound jointly and severally in a bond, the obligee cannot sue two of them only. In the case in 1 *Saunders*, 288. *Cabbell* v. *Vaughan*, it did not appear on the face of the declaration, that there were three obligors, and therefore it was there held no ground of nonsuit; but here it does appear on the record that another was co-obligor with the Defendants; it is not requisite, in order to shew a ground of nonsuit, that it should expressly appear on the record that the third party is living, although it is so laid down by the learned editor of *Saunders*. [*Lawrence* J. A person who is sued as living is presumed to continue alive.] In *Rice* v. *Shute*, 2 *Bl.* 697. Lord *Mansfield* C. J. says, Indeed if the Plaintiff brings an action of debt against *A.* only, and declares upon a joint bond or contract of *A.* and *B.*, this would be fatal, because the declaration would vary from the demand.

Best contrà cited *Askew* v. *Hollingworth*, *Cro. Eliz.* 544. to shew that in order to make the omission of one obligor a ground of nonsuit, the Defendant must expressly shew, that the third obligor sealed the bond, and is yet alive, and that could not in any case appear but by a special plea. In *Whelpdale*'s case it was resolved that if two are jointly bound in a bond, although neither of them is bound by himself, yet neither of them can say that the bond is not his deed. 1 *Williams's Saunders*, 291. *c. note*, where all the authorities are collected.

MANSFIELD C. J. The declaration is against two: it appears on the face of the record that the bond is executed by two. It also appears indeed on the record, that the bond is executed by three, but how does that

prove

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prove that it is not the deed of the two? And if it is the deed of the two, the issue is supported. It would be very odd if proof that a bond was executed by three, should disprove that it was executed by two of them.

LAWRENCE J.* The objection on the record can make no difference as to the truth of that which is in issue. How does it more agree with the truth of the allegation that these two executed the bond, if no one else sealed it, than if another sealed it also?

CHAMBRE J. The issue is not on the nature of the obligation, but whether it is the deed of the party or not. The execution of the deed is alone put in issue, and not the question whether it is the bond of two or the bond of three.

Rule absolute (*a*).

(*a*) HEATH J. was absent, owing to indisposition.

M'ARTHUR *v.* Lord SEAFORTH.

Jan. 31.

On a bond conditioned for replacing stock, the obligee is not entitled to special damages for a profit he might have made if it had been sooner replaced, unless he shews that he actually would have made it.

On a failure to replace stock, the measure of damages is the price at the day when it ought to have been replaced, or the price at the day of the trial, at the option of the Plaintiff.

But not the highest price at any intermediate day. *Semble.*

The Plaintiff gave a bond conditioned to replace 5 *per cent.* stock on a given day. After that day government gave the holders of that stock an option, to be paid off at par, or to commute their stock for 3 *per cents.* The Plaintiff expressed to the Defendant a wish to have the stock replaced, that he might be paid at par, but no wish to take 3 *per cent.* stock. Held that he was not entitled to recover the price of so much 3 *per cent.* stock as he might have obtained in exchange for the 5 *per cents.*

THIS was a writ of enquiry to assess damages upon a bond dated the 27th of *January* 1801, and given by the Defendant to the Plaintiff in the penal sum of 6000*l.*

The

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The condition recited a loan from the Plaintiff to the Defendant of 3200*l.* of the five *per cent.* stock, usually called the loyalty loan; and was declared to be, that the Defendant should at his expence re-transfer 3200*l.* like 5 *per cent.* bank annuities on or before the 27th of *January* 1802; and in the mean time account for and pay the Plaintiff the half-yearly dividends. The first breach assigned, was, that the Defendant did not re-transfer the stock on or before the 27th of *January* 1804, or at any time since: another breach was assigned in 500*l.* for the dividends which were in arrear. By 44 *Geo.* 3. *c.* 99. all persons possessed of any of this stock, who should signify before the 5th day of *October* 1804, their desire to take the benefit of the terms contained in that act, were to have an election, either to be paid at par on the 5th of *April* then next, or were to remain entitled to receive the dividend of the 10th of *October* 1804; and they were further, from that day, to be entitled to receive so much capital stock in the respective annuities therein mentioned as should be equal in value to 100*l.* sterling, estimated at the option of the lords commissioners of the treasury, (such option to be declared on or before the 20th *September* 1804,) in either of the two following modes; that is to say, either such persons should be entitled to hold such capital stock, as part of the consolidated 5 *per cent.* annuities created by the 24 *G.* 3. and several subsequent acts, receiving thereon one half year's dividend on the 5th *January* 1805, and in addition thereto so much reduced 3 *per cent.* annuities as should be equal to the difference between 100*l.* sterling, and the value of 100*l.* consolidated 5 *per cent.* annuities; or in lieu of every 100*l.* loyalty stock, such person should be entitled to so much reduced 3 *per cent.* annuities as should be equal to 100*l.*: and the act proceeds to direct the mode in which the value of the stock shall be calculated. On the 18th *Sept.* 1804, the lords of the treasury declared their option

that

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that in lieu of every 100*l.* of the loyalty stock, such persons who had signified, or who should on or before the 10th of *October*, 1804, signify their desire to take the benefit of the terms contained in that act, should be entitled to hold their stock as consolidated 5 *per cent.* stock, receiving thereon one half year's dividend on the 5th *January* 1805; and in addition thereto, so much stock in reduced 3 *per cent.* annuities as should be equal to the difference between 100*l.* sterling, and the value of 100*l.* stock in the consolidated 5 *per cent.* annuities. And by 45 *Geo.* 3. *c.* 8. all persons possessed of any of the loyalty stock, who in pursuance of the former act had, before the 10th *October* 1804, signified their election to have the same paid off in money on the 5th *April* then next, and who should further signify on or before the 11th *March* 1805, their desire to take the benefit of the terms contained in the act now stating, were, from the 5th of *April* 1805, entitled to receive, in lieu of every 100*l.* of such capital stock, so much capital stock either in the consolidated 5 *per cent.* annuities, (receiving thereon a half year's dividend on the 5th *July* 1805,) or so much capital stock in reduced 3 *per cent.* annuities, as should be equal in value to 100*l.* sterling, together with such further sum in the last mentioned stock, as should be equal to ten shillings sterling on every 100*l.* thereof; the interest whereon was to commence from the 5th *April* 1805; or to have any proportion thereof in such 3 *per cent.*, or 5 *per cent.* annuities respectively, as should be specified by any such person at the time of signifying such desire. The value of such annuities was to be computed on the average price of such annuities on the days and times therein mentioned, which average was to be settled and declared by the governor and company of the Bank of *England*. The governor and company did afterwards settle and declare the average price of the 5 *per cent.* annuities to be 88*l.* 10*s.* 4*d.*

 and

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and the average price of the reduced annuities to be 57*l.* 11*s.* 0*d.* And on the 1st *March* 1805 notice was issued from the treasury, that persons desirous of taking the benefit of the said act should be entitled to receive, in lieu of every 100*l.* of such stock, 112*l.* 19*s.* 6*d.* 5 *per cent.* consolidated annuities, and to receive thereon half a year's dividends on the 5th *July* 1805, or 175*l.* 5*s.* 11*d.* reduced annuities: the interest thereon to commence from the 5th of *April* 1805. Upon the trial at the *Guildhall* sittings after *Trinity* term, before *Mansfield* C. J., the above acts of parliament were referred to, and the facts were proved as above stated. The Plaintiff also gave in evidence several letters which he had from time to time written to the Defendant, soliciting repayment of this loan, of which the following were supposed to be most material to the present case: On the 23d *February* 1804, the Defendant acquainted the Plaintiff that an option was given to the holders of the loyalty loan created in 1797, to be paid at par by government after six months' notice from the 11th *March* then next; and suggested, that as the stock was then about 93½, perhaps the Defendant might think it a proper time to replace the 3200*l.* lent in *January* 1801, that the Plaintiff might be able to avail himself of the opportunity of giving notice of his desire to be repaid at par six months after, at which time he should have occasion for the money. On the 17th of *April*, 1807, he apprised the Defendant, that he had at that time a pressing demand for money, in consequence of his daughter's recent marriage; and he requested the Defendant would discharge the principal of his bond, and the half year's interest due thereon; and, on the 22d of *April*, 1807, he wrote to the Defendant, stating, that he was under peculiar engagements to pay 5000*l.* on the 16th *May* then next, and it would not be possible for him to fulfil it, unless the Defendant by that time should dis-

charge

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charge the bond: that about three years ago he had written to the Defendant, mentioning his wish to be paid the 3200*l.*, and that on the 2d *October*, 1804, he had written to Mr. *Donaldson*, (the Defendant's agent,) to the same effect, as the new government then offered to liquidate the 5 *per cents.* at par; and the Plaintiff assured the Defendant that nothing but the great inconvenience and loss to which he should be subject, if not paid by the 16th of *May* next, would then make him so pressing. On the 6th *September*, 1808, the Plaintiff wrote, stating that "by the stock not having been replaced he had not only been put to great inconvenience, but precluded from availing himself of the advantages resulting from holding that stock in his own name. To avoid therefore all misunderstanding of the tenor of the Defendant's engagements, the Plaintiff transmitted therewith a computation of the principal sum in sterling, due to the Plaintiff in *July* last, when the stock was at the price therein specified, and would have produced to the Plaintiff, had it been replaced, the sum of 3632*l.* 17*s.* 3*d.*, which was the principal sum now to be liquidated by the Defendant: he further claimed, that should the stock at any period hereafter, from any favourable turn of circumstances in the war, get higher than what it was in *July* last, he was equally entitled, from the conditions of the bond, and upon every principle of equity, to receive such additional increase of value." The computation alluded to was, that since the sum of 175*l.* 5*s.* 1*d.* reduced annuity, at 57*l.* 11*s.* 0*d.* *per cent.* with a bonus of 17*s.* 6*d.* sterling, at the same price, making together 176*l.* 16*s.* 8*d.* reduced annuity, was offered by government for each 100*l.* loyalty 5 *per cent.* stock: and since in *July* 1808, from the 8th to the 11th, the reduced annuities were at 69½, it followed that 3200*l.* loyalty 5 *per cents.*, would have produced to the holders, had it been replaced previous

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vious to *October* 1805, so as to have enabled the holder to have availed himself of that offer, a total stock of *5658l. 15s. 0d.* in the reduced annuities, which, at $69\frac{1}{2}$, would produce, in sterling, *3932l. 17s. 3d.* The Plaintiff contended at the trial also, that he was entitled to recover this sum. The Defendant had before the trial offered to repay the sum of *3200l.* being the amount at par of the stock lent. The stock, when first borrowed and converted into money by the Defendant, had produced only the sum of *2800l.* The price of reduced annuities on the day of the trial was $68\frac{1}{4}$, and the price of the 5 *per cent* loyalty stock was $98\frac{1}{2}$. *Mansfield* C. J. was of opinion that the Plaintiff could, in no event, be entitled to more than *3200l.*, which the Defendant had previously offered to pay him, with the interest due thereon; and he accordingly directed the jury to assess the damages at *3282l. 5s. 0d.*; being the amount of the principal so calculated, with the interest due thereon up to the day of the execution of the enquiry. But his Lordship reserved to the Plaintiff liberty to apply to the Court to increase the damages.

Accordingly, *Shepherd* Serjt. in *Michaelmas* term obtained a rule *nisi* to increase the damages. The Plaintiff, he contended, was entitled, upon the breach of the contract, to receive the best of three prices. Either, 1st. the price at the day agreed on for the replacing the stock; or, 2dly, the highest price which the stock bore at any intermediate day between the day stipulated for replacing the stock, and the day of trial; or, 3dly, the price at the day of trial. And he took a distinction between the case where stock is to be replaced on a given day, and where it is to be replaced on demand: there the Plaintiff must make his demand, in order to fix the price.

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Lens Serjt., in this term, shewed cause against this rule. The Plaintiff already receives by his present verdict more than he is entitled to; for he is paid as if the 5 *per cent.* stock was now at par; whereas it is only at 98½. Besides this bond, the Defendant also gave a heritable bond, not for replacing stock, but for the full sum of 3200*l.*, on which bond the Plaintiff now proposes to sue: the stock, when sold by the Defendant, in fact produced only 2800*l.*; and it is quite clear that if a lender takes a bond for the price of stock lent, as an absolute sum, he cannot legally take it in a greater sum than that which the sale of the stock produced. It is therefore advisable for the Plaintiff to consider whether he had not better rest contented with his present verdict; for the heritable bond which charges the Defendant's estate with 3200*l.*, and 5 *per cent.* interest thereon, is an usurious security: it was incumbent on the Plaintiff at the time of the loan to make his election on which of the two instruments he would sue; and he has made his election of the personal bond, by accepting the half-yearly dividends upon the stock in the mean time; for if he now enforces the heritable bond, he will receive more than his principal and 5 *per cent.* interest. On the form of the suggestion, too, it is impossible that the Plaintiff should recover any special damage sustained by the loss of the advantage he might have made of the money, for the breaches he has assigned do not suggest any such, but he has stated simply a general breach, for not replacing the stock, and another for not paying the dividend. If such a claim as this be admitted, it will enable every creditor from whom a debt is detained, to recover damages for the loss of every opportunity which may occur to him of advantageously investing money. The first letter of the Plaintiff shews what option he had made; he requests the Defendant to replace the stock, not that he may exchange it for 3 *per cents.*, but that he may have it paid

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paid off at par. Two years afterwards, having lost sight of the loyalty loan, he expresses his wish to be repaid only on account of the marriage of his daughter; and a few days after, he requires it because he has a large payment to make. It is therefore manifest, that if the stock had been replaced at that period, he would either have turned it into cash, or would have bestowed it as his daughter's portion.

Shepherd contrà, adverted to the case of *Shepherd* v. *Johnson*, 2 *East*, 211. and abandoned his claim to the highest price which the 3 *per cent.* reduced annuities bore at any day between the stipulated day for replacing the stock, and the day of trial; but he contended that he was entitled to the price at the time of trial, of so much 3 *per cent.* reduced annuities, as might have been obtained from government in exchange for the loyalty stock, if it had been replaced in due time: for the Defendant's default, he said, prevented the Plaintiff from putting himself in a condition to hold that stock in lieu of the 5 *per cent.* stock. In his last letter too, the Plaintiff expressly claims the advantages of that exchange. In the common case of a bond conditioned to replace stock, it does not necessarily happen that the obligee wishes to keep the stock, or that he would ever have bought stock with the proceeds, yet he is entitled to the price taken at the day of trial.

Mansfield C. J. What is the Plaintiff entitled to, more than the price of the 5 *per cent.* stock at the day of trial? All his letters require nothing more than to be paid off at par. No application is made to the Defendant at the time when the reduced annuities are at the highest price: the Plaintiff does not say, pay me now, for I can invest it advantageously, and I shall call on you to pay the difference if I do not. Clearly he never then thought of the 3 *per cents.* He lets the time pass by, and he afterwards

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wards states what he could have done. What difference is there between this advantage of investing the sum in the 3 *per cents.*, and the advantage of putting it in trade, or employing it in any other way? At present I can see no difference between the advantage that *might* have been derived, (not an advantage that would have been derived,) from purchasing 3 *per cent.* stock, and the common case of a bond for 500*l.*, which, if paid off, might have been invested in stock at 50, that afterwards rises to 100*l.*, or in an estate, that would yield 10 *per cent.* interest, or in any other stock. And who could collect from the pleadings that the Plaintiff meant to raise at the trial the question what he might have made, (not what he would have made,) if the stock had been replaced? By these letters it certainly appears, that the Plaintiff would not have invested the money in stock; but I lay those letters out of the case.

LAWRENCE J. The first letter, and all the letters, speak of the 5 *per cent.* stock: there is not a hint of the 3 *per cents.* That ultimately the Plaintiff would have been glad to have gotten the advantages of the 3 *per cents.*, cannot be doubted; but on all occasions before the letter of *September*, 1808, he wanted to be paid at par; and even in that letter, when he lays before the Defendant the broker's calculation of his probable gains, he does not say that if he had been repaid he should have bought 3 *per cent.* stock with the money. The last reason given was, that he wanted it to pay his daughter's fortune.

CHAMBRE J. This claim of special damages is perfectly collateral.

Rule discharged (*a*).

(*a*) HEATH J. was absent this day, on account of indisposition.

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Feb. 6.

SKARRATT *v.* VAUGHAN.

If money is paid into court upon one count of the declaration, and the Plaintiff takes it out, he is not entitled to the costs of the other counts of the declaration.

IN this case the declaration consisted of two special counts, upon a policy of insurance, and a count for money had and received: the Defendant paid money into Court upon this count, and to the others, pleaded the general issue. The Plaintiffs having proceeded to trial in an action against another underwriter on the same policy, and a verdict having therein passed for the Defendant, they accepted the money which had been paid into Court in the present cause. But it did not appear that this cause was bound by any consolidation rule to abide the event of the other. Upon the taxation of costs, the Plaintiffs claimed the costs of the special counts: the Defendant insisted they were entitled to the costs of that count only upon which the money was paid into court; but the prothonotary allowed the costs of the whole declaration.

Shepherd Serjt. having on a former day obtained a rule *nisi* that the prothonotary might review his taxation; on the authorities of *Penson* v. *Lee*, 2 *Bos.* 332. *Baillie* v. *Cazalet*, 4 *T. R.* 579. and *Hellier* v. *Hallett*, *Barnes*, 286.

Best Serjt. now shewed cause against this rule. He contended that this case was governed neither by that of *Baillie* v. *Cazalet*, which, he said, was decided solely upon the practice of the court of King's Bench, nor by that of *Penson* v. *Lee*, from which he endeavoured to distinguish it, because in that instance no money had been paid into court, as here it had been; and it was the intention of this court to adopt the rule of practice established in the King's Bench only

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under similar circumstances. At least the officers of the court have never hitherto understood that the costs of the declaration are to be severed; and if it is fit that a new rule of practice should now be promulgated, yet it ought not to affect the fate of actions which were commenced under a confidence in the old practice.

The Court, without hearing *Shepherd* in support of the rule, were clear that they had already declared the practice in the case of *Penson* v. *Lee*, from which this was not distinguishable in principle; or if it were, that the Plaintiff in this case was still less entitled to his costs than in the other. For it would be a strange state of the law, if, in a case where money is paid into court, and where the Plaintiff, being convinced that he has no further cause of action, takes it out, he should have allowed him the costs of the further claim, which he thereby abandons; while, if he persists in his action under a persuasion that he can establish a further claim, he can only have the costs of those counts on which he succeeds.

Rule absolute (*a*).

(*a*) See *Twemlow* v. *Brock*, *post Easter* term, 1810.

Feb. 8.

Evidence given upon trial by the Defendant of his having paid money into court under a rule, does not entitle the Plaintiff to a reply.

THE Court promulgated the following rule of practice on trials at *nisi prius*. It had been a question often agitated in cases where there is a rule to pay money into court, whether the production of it by the Defendant is to be considered as evidence on the part of the Defendant, which gives the Plaintiff's counsel a right to reply. If the Plaintiff took a verdict for the whole of his demand without giving credit for the sum paid into court, the Court would set it aside, without requiring evidence of the existence of such a rule. Therefore let it be understood in future, that it is not evidence on the part of the Defendant, so as to give the Plaintiff a right to reply.

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Feb. 9.

Roberts *v.* Wyatt.

A Plaintiff who is entitled to the temporary possession of a chattel, and delivers it back to the owner for an especial purpose, may, after that purpose is satisfied, and during his temporary right, maintain trover for it against the owner.

Upon a contract for the sale of an estate, the title and abstract to be made at the vendor's expence, the purchaser is entitled to the custody of the abstract, until either the purchase is finally rescinded by consent, or declared impracticable by a court of equity.

And when the contract is determined, the abstract becomes the property of the vendor.

If the sale proceeds, the abstract is the property of the vendee.

But an opinion written thereon, as it was necessarily written on the seller's paper by his consent, continues the property of the purchaser. *Per Mansfield* C. J.

A proviso that in case the vendor of an estate cannot deduce a good title, or the purchaser shall not pay the money on the appointed day, the agreement shall be utterly void, gives an option to the vendor to rescind the sale, in case the vendee does not pay the money, and to the purchaser to rescind, in case the vendor does not make a title, but not *vice versâ*.

Whether a purchaser has a right to the abstract for the purpose of making a title to the purchasers of parcels. *Quære.*

THIS was an action of trover for a written abstract of the title to an estate situate at *Alveston*, in the county of *Warwick*, and for divers sheets of paper of the value of 1000*l.* Upon the trial of this cause at *Westminster* at the sittings in the last *Michaelmas* term, before *Mansfield* C. J., it was proved that on the 9th of *May* 1808, the Plaintiff contracted with Mrs. and Miss *Peers* for the purchase of an estate in the parish of *Alveston*, for 39,500*l.* It was stipulated in the contract that the vendors should, within two months from the date thereof, make out and deliver a true and perfect abstract of the title to the premises, and should deduce a good and marketable title thereto, and that they would on or before the 21st of *Dec.* 1808, on receiving from the Plaintiff the sum of 39,500*l.*, execute a legal conveyance of the fee simple and inheritance of the premises. There was a proviso that in case the vendors could not deduce a good and marketable title, such as the purchaser or his counsel should approve, or if the purchaser should not pay the

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purchase money on the appointed day, the agreement should be utterly void, it being the intention of the parties that no action or suit in equity should be brought thereon. The Plaintiff's attorney, on the 5th of *July*, applied to the Defendant, who was the vendor's solicitor, for the abstract; who accordingly prepared it at the vendor's expence, and delivered it to the Plaintiff's attorney on the 26th of *July*. The Plaintiff's attorney immediately applied for and obtained from him a more perspicuous statement of some things that were insufficiently disclosed; and then, without taking any copy, laid the original abstract with a fee before counsel, for his opinion upon the behalf of the purchaser thereon; upon the 20th of *August* he received it back from his counsel with his opinion written at the foot of the same original abstract, and with numerous queries written in the margin thereof, respecting the proper parties to the assignments of several ancient outstanding terms which he deemed it necessary that the purchaser should get in. On the following day the Plaintiff's attorney left the abstract at the Defendant's house, with a letter, requesting him to take a copy of the opinion and marginal observations, and to return the abstract to himself as soon as he had copied them. After having several times in vain applied to have it restored, on the 20th of *December* he formally demanded it of the Defendant, who answered that he had been unable to clear up the objections of the purchaser's counsel, and that the abstract would therefore be useless to the Plaintiff; he therefore refused to re-deliver it. The Plaintiff, who was then present, offered to take the estate with such a title as the Defendant could make: but the Defendant did not assent to the proposal: the Plaintiff had never consented to rescind the contract, and he had since filed a bill to compel a specific performance. *Shepherd* and *Williams* Serjts. for the Defendant, contended.

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tended, that the Plaintiff had no property in the abstract, and must therefore be nonsuited. *Mansfield* C. J. thought that it was unnecessary to enter into the question of the general right of property therein; the original opinion, paid for by the Plaintiff, was written on the abstract, and the queries were not merely subjoined at the end, so that they could be separated, but were spread all over the margins, and intermingled in every sheet, so that they could not be severed without minutely dividing every part of the paper; it was clear that the vendor had consented that the abstract should be laid before counsel for the very purpose of writing an opinion thereon; and the Plaintiff therefore had such a species of property therein as would enable him to recover in this action. The jury under this direction found a verdict for the Plaintiff, subject to the opinion of the Court upon the point reserved, for 50*l*., which it was agreed should be reduced to 1*s*. upon the Defendant's agent undertaking to re-deliver the abstract, in case the Court should establish the verdict, and consenting that such undertaking should be made a rule of court.

Shepherd accordingly on the following day obtained a rule *nisi* to set aside the verdict and enter a nonsuit, whereupon *Mansfield* C. J. held it quite clear that the opinion of counsel at least belonged to the Plaintiff, and that he must have that back again.

Best, *Lens*, and *Vaughan* Serjts. on this day shewed cause. It is not now to be considered what would be the effect if ultimately the vendor should be unable to make a title to the estate, and the vendee should then be willing to rescind the contract. That is not the case here, and the alternative option to avoid the contract in case there should be well-founded objections to the title,

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is given by the proviso only to the vendee. It is not therefore true, as it was suggested by the Defendant, that the day stipulated for the payment of the money being now passed, the contract is determined at law, and that the abstract is again become the property of the owner of the estate upon that ground: for by the terms of the contract, the money is to be paid on the stipulated day, only on condition that the vendor should previously have done all that was necessary to complete the sale; but that has not even yet been done; for the last formal demand of the abstract was made, and the refusal given, on the 20th of *December*, a day before the period limited for the completion of the contract; consequently there is no infraction of the contract on the part of the purchaser in not yet having paid the money. The Plaintiff does not here so much rely on his absolute property in the abstract, as on that which is the soundest ground for him, his temporary possession of it. The period is not yet arrived at which he is bound to restore it: and so long as the contract is still pending, he has a right to the custody of the abstract. That possession is interrupted only for a special and consistent purpose, that the Defendant may copy the opinion and marginal queries: the Defendant accepts it for that express purpose, and he now retains it for a different purpose: so that it may be said that he fraudulently detained it from the Plaintiff. Whether or not the opinion of counsel, which is the property of the Plaintiff, gives him an absolute property in the abstract on which it is written, need not now be considered. In *Parker* v. *Patrick*, 5 *T. R.* 175. it was held, that an innocent pawnee might recover, against the former owner, goods of which the Defendant had been deprived by false pretences; for that the fraud changed the property: if they had been obtained by felony, the property would not have been thereby changed. That is a much stronger case than this, for here the interest in the subject-matter

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is derived under the owner's contract and voluntary delivery, and is quite sufficient to entitle the Plaintiff to recover, and to hold the abstract until a court of equity shall have determined whether he is entitled to enforce the purchase or not. The true criterion is, to examine whether, if the Plaintiff now had it in his possession, the Defendant could maintain trover for it; and clearly he could not. It being hitherto unknown whether the vendor can make out a title absolutely perfect, the purchaser has a right to the custody of the abstract, in order to ascertain that point; and even if a complete title cannot be made, since he is willing to accept the title, such as it is, he has a right to the custody of the abstract for the purpose of preparing his conveyance. It might be that the Plaintiff was not satisfied with the opinion of his first counsel, and that he wished to take another opinion in order to see whether some of the objections might not safely be waived; but he cannot do this unless the abstract is in his possession, he therefore has a right to the custody of it for that purpose. Another purpose for which he is entitled to the custody is, that he may make copies thereof, and deliver them over to those persons who by entering into subordinate contracts for parts of the estate, will assist him to make good this large purchase. It is observable that the contract specifies that the abstract is to be made at the *vendor's expence;* these words strongly imply that the purchaser is to have the absolute property therein, for if the abstract were merely lent, the words would be superfluous: if, however, the contract were rescinded, the question might then perhaps arise, whether the abstract would still continue to be the property of the purchaser; but under the present circumstances, it is quite clear that he might maintain an action on the case, and it is not less plain that he is entitled to recover in the present form of action. There is no weight in the argument drawn from the case of *Roe on*

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the Demise of Hale v. *Wegg*, 6 *T. R.* 709., for the blots on a title are equally discoverable upon a momentary delivery of an abstract for inspection, as by the continued custody of it.

Williams and *Shepherd* Serjts. in support of the rule. The property of this abstract is in the vendor, at whose expence it was prepared: and the purchaser has no property in it. The opinion of the counsel written on the paper gives no right of possession. [*Mansfield* C. J. Is not the abstract delivered to the vendor for the very purpose of being laid before counsel? and is it not usual to lay before him the very abstract delivered, without copying it, unless where it is copied with the intention of increasing the purchaser's expences?] It can make no difference whether the opinion was written on the same paper, or on another paper pinned to the abstract; nor does it signify whether the abstract is written, or delivered to the purchaser by word of mouth; it is merely a description of the vendor's title, and the rights of the parties are not altered by the circumstance of the conveyancer writing his opinion upon that paper. For if property be lent, or delivered for any special purpose, the bailee cannot, by any act of his own, acquire the greater right therein. The vendee is not entitled to the custody of the abstract for the purpose of carrying the estate to market: he has no right to communicate the state of the title to other persons, in order to see if they will purchase on it. The same argument would equally hold good for divulging the contents of the title deeds; it is attended with the greatest danger, that accounts of a person's title should get abroad: in the case of *Roe, on the Demise of Hale*, against *Wegg*, a person who had bargained for an estate, found by inspection of the abstract, that by the will of one of his own ancestors, the estate was his own, and he actually recovered it. The question here is not whether the Plaintiff could claim the papers

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against a stranger: perhaps he could; but this action is against the absolute owner. It is equally competent for the Plaintiff to resort to a court of equity, if he wishes it, without having the possession of this abstract, as with it; even if the Plaintiff once had a temporary interest in the abstract, that was at an end before the action brought, by virtue of the proviso: for it is clear that on the 20th of *December*, when the abstract was in the Defendant's hands, the title was objected to, and on the 21st there was no conveyance executed, nor was the money paid. It was the intention of the parties, that if the whole matter was not completed by that day, the contract should be entirely at an end; and the Defendant being unable to answer the objections raised upon the title, had a right to insist that it should be so. If the Plaintiff had at an earlier period elected to take the title, such as the seller could make it, the case might have been different; but he postpones that till it is too late. The right to the abstract, whether general or special, of course ceased with the right to the estate; for an abstract is not a chattel, the property wherein passes by delivery: it was delivered for examination only, but it still continued the vendor's property: in the same manner as where a sample of goods is delivered for inspection, if the goods are rejected, and the sample returned, the baillee cannot afterwards bring trover for the sample. So here, after the examination is finished, if the sale does not take place, the abstract still continues the property of the seller, and is no longer in any sort the property of the purchaser. It is one of the seller's title deeds: and it might with equal propriety be contended; that if the seller had delivered the original title deeds for examination, instead of the abstract, and they had been re-delivered, the vendee might again call for them. The purpose of the delivery has been answered: the abstract has been examined, and restored; the paper and the writing thereon are the pro-

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perty of the vendor, and he is henceforth entitled to keep them. If any action at all could have been maintained here, it should have been an action founded on the breach of contract in not a second time delivering the abstract, but the present verdict cannot be supported.

MANSFIELD C. J. The case at first struck me as a singular one. I could not immediately make out that the Plaintiff had any property in this abstract, but my brother *Lens* at the trial nearly satisfied me that he had; and now, on consideration, it is clear that the Plaintiff had, not a special, but a temporary property in the abstract, that is, till the contract is disposed of; and then, I think, it reverts to the vendor, because it would not be proper that an account of the title of a man's estate should get abroad into the hands of strangers. The contract is, that the vendors shall make out and deliver a true and perfect abstract of their title. This is no part of their title deeds: nothing like it; but it is a short account of the state of their title. This then is delivered; for what purpose? 1st, That the purchaser may see whether the title is such as he will accept. He had also a right to it after Mr. *Humphreys* had given his opinion in order to take another opinion in case he had not been satisfied with that, and for the purpose of taking further objections, and of further considering the title. He must have it too, for another purpose, to assist him in preparing his conveyance, that he may see who must be made parties, what form of conveyance is expedient, what parcels are to be inserted, and the like: it is delivered then for these purposes; and after it was so delivered, could the owner of the estate himself call on the Plaintiff to deliver it up? Certainly not: the Plaintiff has a temporary property, not only as against strangers, but as against all the world. Has any thing then been done to alter the state of the parties? Usually,

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if an attorney wishes to save his employer expence, he lays the abstract itself, not a copy thereof, before counsel, and usually leaves several blank sheets and a wide margin for his conveyancer to write queries on, such as whether a deed is duly executed, whether a will is proved, &c. This abstract is in that state delivered to Mr. *Humphreys*, and his opinion thereon having been obtained, it is delivered back, together with the opinion, to the Defendant: for what purpose? That he may answer the objections, and accompany his answers with the re-delivery of the abstract. He says, I cannot answer your objections. The Plaintiff might have said, perhaps some other counsel may think these objections may be waived, let me have the abstract in order to see: but he goes further, and says, I will take the estate with the title such as it is. The Defendant still says, I cannot answer this objection of Mr. *Humphreys*, and the whole transaction is at an end; but that is not so: if the Plaintiff had said, the thing is over, the matter might be rescinded. But what says the Defendant? I cannot answer the objections. In equity such an answer will not suffice; otherwise a seller who had altered his mind, might very easily get rid of a contract; but the courts of equity say he shall answer on oath first in his answer to a bill filed against him, then on examination before a Master whether a title cannot be made, the courts often make a way to obviate apparent difficulties, and compel the seller to procure conveyances in order to complete his title: and the Defendant's declaration that he rescinds the contract, will not at all defeat the purchaser's right. This action then must be sustained, for the Plaintiff had a temporary property, which was not determined, because he had an option whether the thing should go on or not. Something has been argued on the construction of the proviso that in case the vendor could not make a title, the contract should be void. But in order to adapt that defence to

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the present case, the argument must be, that if the Defendant *says* he cannot answer the objections, it shall be absolutely void at the choice of either party. But that is not so: the meaning is, that if the seller cannot make a good title by the time mentioned, the contract shall be void as against him, and the Plaintiff has a right to be off his bargain. So, *e contrà*, if the Plaintiff does not pay the money, the Defendant may avoid the contract; but the Plaintiff cannot say, I am not ready with my money, therefore I will avoid the contract; nor can the seller say, my title is not good, therefore I shall be off. And the word is, "if they *cannot* make," so it must appear by sufficient proof, that they cannot make a title. Therefore it seems that the Plaintiff has a temporary property, on which he may recover, not only against a stranger, but against the proprietor of the estate; and that property continues until all the purposes are answered for which the abstract was delivered.

LAWRENCE J. I am of the same opinion upon the construction of the proviso: it would be a monstrous construction if either party could vitiate the agreement by refusing to perform his part of it. The question then is, whether the purpose was answered for which this abstract was delivered; for I admit it would be a mischievous thing, if accounts of a person's title could get abroad; and therefore not only is the abstract to be returned, but no copy to be kept, lest it should be used for a mischievous purpose. But was the time come when the abstract was to be returned, all the purposes having been discharged for which it was delivered? Certainly not. The abstract is returned for a particular purpose; the Plaintiff's attorney tells the Defendant that it is delivered to him for the purpose of his examining and answering the objections, and that it must be again restored to the purchaser; and the Defendant accept it on these terms. Having then accepted it on these terms, he cannot afterwards say he

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will keep it on other terms. It is not enough for the Defendant to say he cannot remove the objections; the purchaser has a right to a better proof that they cannot be removed than the Defendant's assertion.

CHAMBRE J.* As to the general property in the abstract, it is hard to say who may have it; while the contract is open, it is neither in the vendor nor in the vendee absolutely; but, if the sale goes on, it is the property of the vendee; if the sale is broken off, it is the property of the vendor. In the mean time the vendee has a temporary property, and a right to keep it, even if the title be rejected, until the dispute be finally settled, for his own justification, in order to shew on what ground he did reject the title; but it is not necessary at present to go into the absolute property. This action can be sustained on the right of possession, which the Plaintiff clearly at this time had; therefore the rule for a nonsuit must be

Discharged.

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If the Plaintiff in covenant assigns as a breach that the Defendant did not repair, a plea that the Defendant did not break his covenant is bad on special demurrer.

Although the declaration concludes by averring that so the Defendant hath broken his covenant.

But it would be good after verdict.

An assignee of a lease by indenture is estopped by the deed which estops his assignor.

Therefore he cannot plead *non dimisit.*

But if an estate be created by deed poll, *ne lessa*, *ne granta*, *ne chargea*, *ne enfeoffa*, *ne dona*, &c. are good pleas for a stranger to the deed.

THE Plaintiff declared that by indenture between himself and *H. Saxelby*, he had demised to *Saxelby* and his assigns a certain messuage, *habendum* for five years,

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and he stated a covenant by *Saxelby* to repair during the term. He then averred *Saxelby*'s entry and possession, and that, on the 1st *January* 1808, all his estate and interest, by assignment thereof legally made, came to and vested in the Defendant, and averring performance of all that was to be done by the Plaintiff, he assigned for breach that the Defendant, as such assignee, did not nor would after the assignment, repair; but, on the contrary thereof, permitted the premises to be ruinous, &c.; and so the Defendant had not kept the covenant so made by *Saxelby* for himself and his assigns with the Plaintiff, but had broken the same.

The Defendant pleaded, first, that the *Plaintiff did not demise* the premises to *Saxelby* in manner and form, &c. Secondly, admitting the demise and assignment in the declaration mentioned, that he the Defendant did *not break or neglect to keep the covenant* so made by *Saxelby* with the Plaintiff in manner and form, &c. The Plaintiff demurred, and assigned for causes, that the Defendant had not by his first plea denied the indenture to be the deed of *Saxelby*, nor confessed, or in any manner avoided the same; and that it was only argumentative, and no direct answer to the matter contained in the declaration; and that no apposite or proper issue could be taken thereon; and that the second plea was only argumentative, and no direct answer to the declaration; nor was it therein alleged, whether the Defendant had or had not, since the assignment, and during the continuance of the demise, and whilst he was possessed of the premises, sufficiently repaired and kept the same; nor was it therein set forth how or in what manner the Defendant had kept and performed the covenant.

Best Serjt. in support of the demurrer, was at first stopped by the Court, who desired *Shepherd* Serjt. to support his pleas: as to the second plea he admitted, and the

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the Court held, that according to *Walsingham* v. *Coomb*, 1 *Lev.* 183., the substantial breach was assigned in the not repairing; and though the declaration concluded, "and so the Defendant hath not kept his covenant," yet that the pleas "that the Defendant hath not broken his covenant," although the defect would be cured by verdict, could not be supported if the objection was pointed out by a special demurrer.

Upon the first plea, *Best* contended that the Defendant was estopped from pleading that the Plaintiff did not demise. It was clear that *Saxelby* would have been estopped by his indenture to plead this plea. *Co. Dig. Pleader.* 2 *W.* 48., *Cro. Jac.* 73. *Style* v. *Herring.* Count upon a demise by indenture, and a plea traversing that the Defendant was possessed by virtue of the lease, was held bad; and if the plea would have been bad for the lessee, it is equally bad for his assignee. In 7 *T. R.* 537. *Parker* v. *Manning*, it was held that in an action of covenant brought by the assignees of a bankrupt, *nil habuit in tenementis* could not be pleaded. And the principles on which Lord *Kenyon* C. J. and *Grose* J. declared their opinions in that case, are equally applicable to this. The same doctrine has prevailed in *Kemp* v. *Goodal*, 1 *Salk.* 277. *Heath* v. *Vermeden*, 3 *Lev.* 146., and several other cases; and if *nil habuit in tenementis* be a bad plea because the Defendant is estopped, *à fortiori* he must be estopped from pleading *non dimisit* to an indenture. The Defendant admits on the record that the lessor executed the indenture, and the indenture states a demise: if this plea is equivalent to denying the effect of the indenture, it amounts to a demurrer, and is therefore bad; if it denies the execution by either party, it is a circuitous way of pleading *non est factum*, and must not be allowed. It is true that, in some cases of demise, not by indenture, the plea might be good.

Shepherd contrà. It is not contended that either lessee or assignee can plead *nil habuit in tenementis*; nor, that on a covenant

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covenant executed by both parties, either can plead *non dimisit;* there the plea must be *non est factum.* But where the Defendant is not party to the deed, this is the proper plea. *Br. Ab. Estraunger al fait. pl.* 4. In *quare impedit*, it was said by *Kirton*, and not denied, that a privy to a deed which is pleaded, shall say *non est factum*, but not a stranger: but he shall say that the Plaintiff did not grant by the deed, or did not release by the deed, or did not enfeoff by the deed, or did not charge by the deed, and the like. *Pl.* 6. A stranger to the deed shall not say *non est factum;* but he did not give by the deed, or nothing passed by the deed. *Pl.* 22. Trespass for cutting trees. *Rolfe* pleaded in bar: the Plaintiff made title by a deed to which the Defendant was a stranger: *Rolfe* pleaded, that nothing passed by the deed. *Strange* J. A stranger to the deed shall not say *non est factum*, nor nothing passed by the deed, because he is not privy thereto: wherefore *respondeat ouster;* whereon *Rolfe* said, that he did not enfeoff by the deed. *Quod nota.* 10 *H.* 6. 7. *Bro. Ab. Estraunger. pl.* 13. & *pl.* 16. *acc.* The cases on *nil habuit in tenementis* therefore, are not applicable, for the plea is not, that the deed is not the deed of the lessor, but that it is not the deed of the lessee; it therefore can only be pleaded in cases where the Defendant can deny the deed to be his own. [*Chambre* J. That is denied by the general issue in almost all actions of covenant: *non est factum* is hardly ever omitted.] It is admitted that a party is charged by the execution of his own deed, and it is admitted that an action may be sustained against the assignee in respect of the privity of estate, if the lease be not by indenture: but in covenant on indenture the Defendant is charged in respect of the specific execution of the indenture.

Best in reply. This plea puts in issue the demise stated in the deed set out in the declaration, and is therefore bad. All the cases cited where the plea has been held good,

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good, are cases of deeds poll. There is the distinction: in debt for rent by lease, not indented, the Defendant may plead *nil habuit in tenementis*. *Lewis* v. *Willis*. 1 *Wils*. 314. Besides, the authorities cited, are only that a stranger may so plead, but an assignee is not a stranger. No authority is cited to shew that an assignee may not plead *non est factum*. The Defendant might as well plead at once that the premises did not come to him by assignment; for if there was no deed, there was no assignor, and if there was no assignor, then there was no assignment.

Cur. ad. vult.

The judgment of the Court was now delivered by

MANSFIELD C. J. The question on this demurrer is, whether the plea *non dimisit* be good, when pleaded by an assignee, who has the estate of the lessee conveyed to him, which estate is created by indenture. There is nothing more clear than that where a lessee takes an estate by indenture, he is not at liberty to plead *nil habuit in tenementis*, nor in any way to dispute the title of his lessor. Now this plea puts in issue, amongst other matters, the title of the lessor. It is truly stated for the Defendant, that in cases of a grant or feoffment, a stranger may plead, "did not grant, or did not enfeoff," and that plea denies not only the existence, but the efficacy of the supposed grant or feoffment. It brings in issue therefore the title of the grantor, as well as the operation of the deed, and that plea would be a proper plea to bring in issue the execution, construction, and efficacy of any deed of demise. Then the question comes, whether the assignee of the lease may be allowed to contravert the title of the lessor, when the lessee, under whom he derives, could not controvert the title of the lessor; so that the assignee should have a better right than he from whom he derives it. Exclusive of all the *dicta*, it would be a very odd thing in the law of any country, if *A.* could take, by any form

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of conveyance, a greater or better right than he had who conveys it to him; it would be contrary to all principle. But it does not rest merely on the general principle; for if you look into all the books upon estoppel, you find it laid down, that parties and privies are estopped, and he who takes an estate under a deed, is privy in estate, and therefore never can be in a better situation than he from whom he takes it. I cannot distinguish *Parker* v. *Manning* from this case, though it is the converse. In a late case in this court, (*a*) *Williams* Serjt., by an able argument for a devisee, endeavoured to convince us that a recovery was void, because there was no tenant to the *præcipe*; but it was answered for the heir, that the devisor was tenant on the record, and therefore estopped from disputing the recovery, and the devisee consequently was estopped. In the case of *Trevivan* v. *Lawrence*, 1 *Salk.* 276., cited by *Williams* in that argument, a judgment in *scire facias* against terretenants, which recited the original judgment as of the wrong term, was held to be an estoppel. For these reasons the Defendant is as much estopped from pleading this plea as if he had been the original lessee, and consequently the judgment on these demurrers must be For the Plaintiff.

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(*a*) See *post*.

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If after action commenced, and before money can regularly be paid into court, a tender is made of a sum for damages, with costs up to that time, and refused, the Court will, on motion, permit that sum to be paid into court, and struck out of the declaration, and will order all subsequent costs to be paid by the Plaintiff.

Although the Plaintiff goes for other causes of action, than those on which the sum is tendered.

SHEPHERD Serjt. had on a former day obtained a rule *nisi*, that the Defendant might be at liberty to pay into court on the five last counts of the Plaintiff's declaration,

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declaration, the sum of 31*l.* 10*s.*, and that if the Plaintiff should accept thereof with costs up to the 27th day of *December* last, he should pay the Defendant all the costs incurred since that time, the Defendant having on that day tendered that sum to the Plaintiff's attorney, and that if the Plaintiff should not accept thereof with such costs, that sum might be struck out of the declaration. The facts upon which this rule was obtained, were, that the writ having been sued out, the Defendant's attorney undertook to appear, and afterwards tendered the sum of thirty guineas, and the costs of the action to that time; but the Plaintiff's attorney refused to accept it, and afterwards delivered a declaration, consisting of eight counts, and also a particular of his demand, charging the Defendant with the above-mentioned sum of thirty guineas for nine months' wages, and with a further sum of 68*l.* 10*s.* for damages alleged to have been sustained by the Plaintiff in consequence of the Defendant having improperly dismissed him from his service.

Best Serjt shewed cause against this rule; he endeavoured to distinguish this case from that of *Zeevin* v. *Cowell*, determined here in the last term, because it did not appear but that the Plaintiff had in this instance originally demanded a much larger sum than had been tendered, and for other causes of action: he also insisted on the greater degree of delay which had taken place here, about seven weeks having intervened since the tender.

Shepherd, contrà.

The Court made the rule absolute.

END OF HILARY TERM.

CASES

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IN THE

COURTS OF COMMON PLEAS,

AND

EXCHEQUER-CHAMBER,

IN

Easter Term,

In the Fiftieth Year of the Reign of George III.

Bell *v.* Puller and Another.

May 9.

A ship was let to freight for the voyage, to take out a small cargo of lead to P. and to bring home a return cargo, for which freight was to be paid at 11 guineas a ton for the whole ship's admeasurement. If from political circumstances she should be unable to discharge her cargo, and consequently to obtain a return cargo, the freighters agreed to pay a gross sum, less than the amount of the freight *per* ton; the ship being prevented from discharging, and the freighter supplying no homeward cargo, the master took in goods on freight, and brought them home together with the lead. The Court held that he was entitled to receive the gross sum stipulated, and also to retain the freight which the ship had earned.

If a Plaintiff recovers a greater sum than he claims by his particular, and upon discussion the Court sanctions the principle on which he recovers, and judgment is entered up accordingly, no objection having been made to the excess above the particular, either at the trial or on the argument, the Court will not reduce the judgment to the sum claimed by the particular.

THIS was an action of debt on a charter-party; and the material parts of the declaration, which set out the whole charter-party, were as follows. It was averred

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that the Plaintiff, master of the *American* ship, the *Resolution*, of 305 tons, then lying in the port of *London*, had granted and letten the said ship to freight unto the Defendants, who had accordingly hired and taken the same to freight for the voyage, upon the following terms: first, the Plaintiff covenanted with the Defendants, their correspondents, &c. that the ship should be tight, &c. and provided with all things necessary for her intended voyage, and should immediately, and as soon as a *British* licence could be procured, receive on board from the Defendants about 150 tons of lead, and the lead being put on board, and the ship dispatched, should immediately depart from *London*, and, wind and weather permitting, proceed to *Petersburgh*, or so near thereunto as she could safely come, or some other port in the *Baltic*, where she could go with safety without lightening, should circumstances render it unsafe to go to *Petersburgh*; and then and there unload, and make a right delivery of the cargo so loaded at *London*, unto the correspondents of the Defendants, agreeably to bills of lading, and that the Plaintiff thereupon would immediately receive on board at such port of discharge, from the correspondents of the Defendants, a full cargo of goods, not exceeding what the ship could reasonably stow; and the cargo being so loaded, and the ship dispatched, that she should immediately, wind and weather permitting, return to *London*, and there make a true delivery of the cargo so loaded at *Petersburgh*, or such other port in the *Baltic* as aforesaid, unto the defendants; and so upon such delivery and discharge end her voyage, the dangers and perils of the seas, restraints of princes and rulers, (except in the case thereinafter provided,) and accidents by fire and navigation excepted. And the Plaintiff also covenanted that the ship should lay at her ports of loading and unloading, fifty running days in the whole, for the purpose of loading and unloading the respective cargoes, the same to

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commence and be computed from the day of the ship being ready to receive on board her outward cargo, and when such cargo was put on board, commence again on her arrival at *Petersburgh*, or at such other port of discharge in the *Baltic*, and report at the custom-house, and on notice given to the correspondents of the Defendants, of her being ready to unload; and when the cargo was unloaded, commence again when the ship was ready to receive on board her return cargo, and on the day such cargo was loaded and put on board, and the said ship ready to depart, commence again on the day of her arrival and report at the custom-house at her port of discharge for the said return cargo, and on notice given of her being ready to unload; and so continue until the whole of the said lay days should be fully ended; in consideration whereof, the Defendants covenanted to procure for the ship a *British* licence, and *not only* to load and put on board 150 tons of lead at *London*, and on the ship's arrival at *Petersburgh*, or at such other port in the *Baltic*, to unload and receive the same from on board, and *thereupon put on board such return cargo*, and on the arrival of the ship at *London*, to unload and receive the same from on board, *but also to pay* the Plaintiff in full for *the freight or hire of the ship*, at the rate of 11*l.* 11*s.* sterling per ton, *American* register admeasurement, and which tonnage was agreed to be $304\frac{4}{9}\frac{5}{5}$ tons, together with 10*l. per cent.* thereto for primage, and a hundred guineas as a gratification to the Plaintiff, as master, for his care and attention to the cargo during the voyage; the same to be paid immediately upon a true delivery of the return cargo at *London*, by approved bills at two months' date from the report of the vessel at the custom-house. And the Plaintiff covenanted that if political or other circumstances should prevent the shipping a return cargo, *or* discharging the outward cargo, that the Defendants and their correspondents should be at liberty to detain the

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ship at *Petersburgh*, or at such other port in the *Baltic*, the space of 40 running days in the whole, after her arrival there; and the Defendants covenanted that after the ship should have remained at *Petersburgh* or at such other port in the *Baltic* 40 running days *without such outward cargo being unloaded, and consequently without the return cargo being loaded*, the Plaintiff should *be at liberty to return with his ship to* London, *or any port in* England, and that *upon her arrival at* London, *or in any other port in* England, they would pay the Plaintiff 2700*l.* sterling, together with 10*l. per cent.* thereon, and 100 guineas as a gratification to him as master; and it was moreover agreed between the parties, that if the ship should return with a cargo, and without convoy, she should touch at *Dundee* or *Leith* for the purpose of obtaining fresh clearances, and convoy for *London*. Provided, that it should be lawful for the Defendants and their correspondents, &c. to detain the ship upon demurrage, in case she should not be completely unloaded, loaded, and finally discharged within the time limited, 20 or fewer running days in the whole, over and above the 50 running days thereinbefore mentioned; for which demurrage days the Defendants covenanted to pay after the rate of ten guineas per day. And to the true performance of the premises the parties did severally bind themselves, especially the Plaintiff, his ship, her freight, and appurtenances, and the Defendants the goods to be loaded on board the same, reciprocally unto each other in the penal sum of 5000*l.* And the Plaintiff protesting performance on his part, and non-performance on the Defendants, averred, That the ship being tight, and provided with all things necessary for her intended voyage, did receive on board from the Defendants the cargo of lead at *London*, and thereupon therewith sailed for and arrived at *Petersburgh*, or as near thereto as she could safely come, and that the ship was then and there ready to have unloaded and made

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a true delivery and discharge of the lead to the correspondents of the Defendants, and to have received on board a full and complete cargo; and the Plaintiff then and there gave notice of the ship's arrival to Messrs. *Anderson* and *Moberly*, the correspondents of the Defendants; yet the Defendants did not, nor did their correspondents, receive the lead from on board, nor load and put on board any return cargo, nor did they require or direct the ship to go to any other port in the *Baltic;* and thereupon the ship remained at *Petersburgh* for 40 running days, without such outward cargo being unloaded, and without any return cargo being put on board by the Defendants, or their correspondents. And thereupon the Plaintiff did afterwards, and after the expiration of the forty running days, return with his vessel to and afterwards arrive at *London*, with the said cargo of lead on board for the Defendants. And he assigned for breach that the Defendants did not pay him the sum of 2700*l.* sterling, together with 10*l. per cent.* thereon, and 100 guineas as a gratification to him as master, nor had they in any other manner paid or satisfied him for the said voyage, or the freight of the ship; whereby an action had accrued to the Plaintiff to demand the said 5000*l.* penalty, parcel, &c. There was also a general count in debt for freight, and a count for 1617*l.* 11*s.* upon an account stated. The Defendants pleaded, 1st, the general issue; and, 2dly, to the first count of the declaration, that political circumstances did prevent the shipping a return cargo on board the *Resolution*, and discharging the outward cargo from on board her, in the voyage by the charter-party agreed upon, by means whereof the Plaintiff at the end of the 40 days, did, without any default of the Defendants or their correspondents, but in consequence of the said political circumstances, return with the ship *Resolution* to *London*, without bringing back a return cargo to the Defendants, by

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by reason whereof, and according to the true intent and meaning of the charter-party, there was justly due to the Plaintiff from the Defendants in respect of the charter-party and voyage only the sum of 2700*l.* sterling, together with 10*l. per cent.* thereon, and 100 guineas as a gratification to the Plaintiff as master: but that the Plaintiff at the time of suing forth his original writ, was indebted to the Defendant in a larger sum, to wit, in 3500*l.* before that time by the Plaintiff had and received to the use of the Defendants, which they offered to set off. The Plaintiff, after protesting that the said return of the said ship was not without any default of the Defendants, as in that plea is mentioned, replied to the last plea, that he was not indebted to the Defendants. The Plaintiff delivered under a summons a particular of his demand, in which he claimed a balance due from the Defendants to the Plaintiff, arising as under:

				£.	s.	d.
Dr.						
To freight of $304\frac{4}{9}\frac{4}{5}$ tons per ship *Resolution*, at 11 guineas per ton - -				3516	6	0
Primage, 10*l. per cent.* - -				351	12	0
Gratification - - -				105	0	0
Charges attending the lead - -				46	14	6
				4019	12	6
Cr.	£.	s.	d.			
By amount of freight from *Thornton*'s and *Bayley*	2062	13	9			
By 15 tons of hemp, of the Plaintiff's - -	225	0	0			
Add 5*l. per cent.* for primage, instead of 10*l. per cent.* allowed - -	114	7	9			
				2402	1	6
Due to Captain *Bell* - -				1617	11	0

Upon

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Upon the trial of this cause at the *Guildhall* sittings after *Trinity* term 1809, before *Mansfield* C. J. it appeared that on the arrival of the vessel in *Russia*, the state of that country was such that the vessel was not permitted by the government to unload the outward cargo; that the master addressed himself to Messrs. *Anderson* and *Moberly*, the Defendants' correspondents there, for directions what he should do, and they refused to give him any: that thereupon, after waiting the 40 days, and having done his best endeavours to obtain a return cargo there, he set sail and called at *Stockholm*, where he took in a quantity of hemp, which he stowed on the lead; the hemp belonged chiefly to Messrs. *Thornton* and *Bayley*, from whom he received for freight the gross amount of 2278*l*. 0*s*. 9*d*., and he shipped a small quantity on his own account, the freight whereof was of the value of 225*l*. together 2503*l*. 0*s*. 9*d*. In order to obtain this freight, he waited at *Petersburgh* several days after the expiration of the 40 days, and incurred expences to a considerable amount. On his arrival in *England*, he delivered the lead to the Defendants in *London*, and required payment of the whole freight that would have accrued upon a complete homeward cargo, offering to give the Defendants credit for the homeward freight he had earned; but they refused to pay upon that calculation. The jury found a verdict for 3121*l*. 14*s*. 6*d*. composed of the following items:

	£.	s.	d.
The dead freight homewards - -	2700	0	0
Ten *per cent*. thereon - -	270	0	0
Gratuity to the master - -	105	0	0
Expences incurred in bringing the lead to *London* - - -	46	14	6
	3121	14	6

Best

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Best Serjt. in the ensuing *Michaelmas* term obtained a rule *nisi* that the verdict might be reduced to 618*l.* 13*s.* 9*d.* by deducting from the amount found by the jury all the freight which had been earned on the homeward voyage.

Shepherd and *Vaughan* Serjts. in the same term shewed cause against this rule. The nature of the contract is this: the Plaintiff agrees to carry out this lead to *Petersburgh* for nothing, and he looks for his profit to his homeward voyage; the compensation for which is calculated in two methods, according to the success which the freighters may have in obtaining a cargo: in the event of their failure, the freighter is to pay the ship owner the lower sum of 2700*l.* only, in the nature of liquidated damages on a breach of the contract; but in that case the ship is free for the owner to employ her in any manner he pleases; it is the price of a mutual release from the contract: in the event of the freighters procuring a cargo, they are to pay, not according to the quantity of goods shipped, but according to the whole admeasurement of the ship's tonnage, whether they ship more goods or less; in that case, indeed, but in that case only, is the whole ship hired by the Defendants, and theirs for the homeward voyage. The circumstances which have occurred were unlooked for when the parties framed this instrument; they did not contemplate that there could be a return cargo, unless the outward cargo was first discharged; their language is, if she is not enabled to discharge her outward cargo, *consequently* she will not be able to bring home a return cargo. And they have not even stipulated that on the loss of the sale of the outward cargo, the Plaintiff shall bring back the lead, nor directed what shall be done with it. But in fact he does bring home goods on freight, and what is material to observe, he spontaneously brings the lead home also; which perhaps

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perhaps is sufficient to entitle the Plaintiff to the full freight of eleven guineas *per* ton. At least this either is a return cargo, or it is not. The Plaintiff is willing to give the Defendants their option, whether they will consider the homeward voyage as theirs or not; if they do, all the earnings are theirs, and he will give them credit for the freight received, but in that case they must pay the full freight of 11 guineas *per* ton for the homeward cargo, and the demurrage and other expences incurred in shipping it; for if they will have the benefit of the ship for the homeward voyage, they must pay the rent of it, and the price of a return cargo. But if they do not elect this, the Plaintiff has a right, upon the return of his ship from this frustrated voyage, to stand on his covenant, and to receive the 2700*l.* dead freight, and to do as he will with the ship on the homeward voyage. But in the second alternative, there can be no set-off: for there was no debt due to the Defendants, unless they were freighters of the ship homewards; and if this money were still unpaid, they could not sue the owners of the hemp for it, except in that character, which by their plea they disclaim: they must either wholly renounce the homeward voyage, or acknowledge it with all its consequences. It is true that in *Puller* v. *Staniforth*, 11 *East*, 332., a case on a policy, which arose on a similar charter-party, and under circumstances in a great measure similar, Lord *Ellenborough* C. J. assumed, that Messrs. *Puller* were entitled to the sum earned on the homeward voyage, and that it might be set off against the dead freight; and *Le Blanc* J. says, "the loss has been evidently diminished *pro tanto*, by the freight earned from *Stockholm*." But there is an important difference between the two cases: for there the captain acting for the best, and making himself agent for the freighters, sold the lead at *Stockholm*, and took in a return cargo: here the Plaintiff actually addresses himself to the Defendant's agents

at

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at *Petersburgh*, and they renounce the homeward voyage, and it is not till after he has staid the 40 days, and has performed every thing stipulated by the charter-party, that he prepares to take in a cargo on his own account. But there was a circumstance which was not adverted to. If Messrs. *Puller* adopted the acts of their captain, and the homeward voyage, they did in effect ship a return cargo, and then the freight received might be properly set off against the freight due for the homeward voyage; but in such case 10*l.* *per* ton was the freight due for the homeward voyage, whereas those learned judges seem to have considered that in no event was more to be paid than the 2500*l.* dead freight, which was not the case. There, however, the point was at most only incidentally and collaterally decided; and moreover it does not appear that the question ever was raised by the counsel, and the interest of Messrs. *Puller* did not require that it should be raised; for it was indifferent to them: therefore the point not having been discussed, the decision is entitled to the less weight. [*Mansfield* C. J. and *Heath* J. Might not this be deducted without a set-off? if money, received as this was, without the Defendants' knowledge or privity, can be considered as money received for them, is it not payment to the Plaintiff *pro tanto?* and may it not be given in evidence on *nil debet?*] Or at all events the Defendants must repay the demurrage, and other expences which the Plaintiff has incurred in obtaining and shipping this additional cargo; the amount may properly be referred to one of the special jury to ascertain.

Best contrà. By asking for the demurrage incurred after the 40 days, the Plaintiff has in effect conceded that the freight earned belongs to the Defendants. Something is due for demurrage, but the amount ought to have been settled by the jury; the Defendants, however, will make no technical objection on that account. The

transaction

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transaction is this: the lead is shipped for *Russia;* if sold there, the Defendants will be in a situation to purchase there with the proceeds a return cargo. But it is known that they probably may not be able to land the cargo there; if it is not landed, the lead must be brought back, and this will be a losing adventure. Things being so, the Plaintiff and Defendants enter into this charter-party, which stipulates, that if the Plaintiff goes to *Russia* and *sells*, (for going thither only is not sufficient,) the Defendants will pay 11 guineas *per* ton, but to secure the captain from loss by his voyage, though the Defendants themselves may lose, they will give him 2700*l.* It is clear that the Plaintiff is not entitled to the 11 guineas *per* ton; for the covenant is, that the Defendant on the true delivery of the return cargo, that is, a cargo bought with the proceeds of the outward cargo will pay 11 guineas *per* ton. The bringing home a return cargo, therefore, bought with the proceeds, is a condition precedent to the 11 guineas becoming due, and the event has never happened on which it was to accrue, nor in the declaration does the Plaintiff go for it. Much has been said in this case of dead freight. The usual acceptation of which is, a sum paid as a compensation for the omission to supply freight, when a ship returns in ballast. But this charter-party does not contemplate the circumstance of returning empty; it is not said, if the ship returns in ballast, you shall have 2700*l.*, but if she returns *without unloading the lead*, the Plaintiff shall have the 2700*l.* [*Mansfield* C. J. The stipulation is, that the 2700*l.* shall also be paid, in case circumstances should prevent the shipping a return cargo, which will include the case of returning in ballast.] The ship did return without either unloading the lead, or shipping a return cargo; in which case the Plaintiff is to receive 2700*l.* only, and he has got, notwithstanding the present rule, the whole of that sum. The question then is, what the Defendants have for

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for the 2700*l.*? Wherever a ship is chartered at a specific sum for the voyage, without relation to the quantity of goods to be carried, the contract is, as Lord *Hardwicke* Chancellor says in 2 *Atk.* 621. *Paul* v. *Birch*; cited by Mr. *Abbott*, *On shipping*, *3d edit.* 293. rather a contract for the use of a ship for the voyage, than for the freight of the goods. This, therefore, is an absolute contract for the letting and hiring of the ship for a clear voyage out and home; whether one sum or another sum shall be paid for it, depends on a certain event; but whether the one sum or the other sum becomes payable, the ship is the Defendants' for the voyage, and whatever casual advantage may arise therefrom, belongs to him who has hired it for the voyage, not to him who has let it. As if a man should hire a house, to pay one rent in one event, and another rent in another, if any profit is made in the mean time of the house, the tenant must have the benefit thereof. Although the Defendants could not have compelled the captain to take these goods on board; yet, being put on board, they are there for the benefit of the Defendants, who would be put in an awkward situation, if this Court should decide, in express contradiction to the decision of the court of King's Bench, that the freight earned is not to be deducted. [*Mansfield* C. J. and *Heath* J. The point was not argued before *B. R.*; the counsel never took the point.] In *Abbott On shipping*, *3 ed.* 195. a *French* ordinance is mentioned, which directs that if the ship be freighted by the great, and the merchant do not furnish a full loading, yet the master shall not, without his consent, take in other goods to complete the freight, nor without accounting to the freighter for the freight of such goods. So here, this ship is hired by the great; the master, according to the principle of this ordinance, which is the equity of the case, ought to account for this freight.

Cur. adv. vult.

MANS-

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MANSFIELD C. J. in *Hilary* term delivered the opinion of the Court.

This is an action brought on a charter-party of a very singular sort: the demand is for 2700*l*. by a technical phrase called dead freight: the Defendant insists that he is not bound to pay the whole of the 2700*l*., because the Plaintiff, as the owner of the ship, acquired some freight, for goods, which he procured to be loaded on board at *Petersburgh*, and brought to *England*: and the question is, whether the Defendant is entitled to make any such deduction, or whether the Plaintiff is entitled to recover the whole of the 2700*l*. The declaration states that the owner, the Plaintiff, let the vessel on a charter-party to go to *Petersburgh* from *London*. There is a covenant that the ship should be tight, &c., and that she should take on board 150 tons of lead, and carry the same to *Petersburgh*, or as near as she could, or to some other port in the *Baltic* where she could go without lightening, and would immediately receive on board a cargo of goods, and immediately proceed to *London*. The ship was to lay at *Petersburgh* 50 running days in the whole. The Defendants covenant to put the lead on board, and to procure and put on board at *Petersburgh* or some other port in the *Baltic*, a homeward cargo; to pay 11*l*. 11*s*. *per* ton freight, 10 *per cent*. primage, and 100 guineas gratuity to the captain: it was provided that if political or other circumstances should prevent the Defendants from shipping a return cargo, they might detain the ship at *Petersburgh* 40 days after her arrival, and that after she had laid 40 running days without her cargo being unloaded, and consequently without a home cargo being loaded, the Plaintiff should be at liberty to return to *London* or any port in *England*, which is an extraordinary part of the contract. Such was the case, that the *Russian* government would not suffer the outward cargo to be unloaded; and in that event, after the 40 running

days

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days had expired, and the Plaintiff was at liberty to return to *England*, he acquires freight. It is very extraordinary that the charter-party contained no covenant to bring back the lead to *London* in case of the non-delivery at *Petersburgh*; for the lead would probably be worth much less at *Plymouth*, or any other distant port, than in *London*. However the 2700*l.* is to be paid on the lead being delivered at any port in *England*. The object of the voyage was the return cargo. The ship was to carry 304 tons and some decimals, at the freight of 11 guineas *per* ton; and the freight of a full cargo, at this rate, would have much exceeded 2500*l.* Since the homeward cargo could not be obtained, the Defendants were, I suppose, to have their lead brought back, though it is not so expressed; and it may be conjectured that the reason why the deed is so inaccurately drawn, was, that the parties inferred, that if the lead should not be unloaded, it would come back to *London* on the same terms on which the ship would return empty in case there was no return cargo; but that is inconsistent with the other clause, which makes the dead freight payable on the ship's arrival at any port in *England* (*a*); for certainly the charter-party imposes on the Plaintiff no obligation to bring back the lead to *London*. This makes it a very extraordinary case; and none of the cases mentioned by Mr. *Abbot*, or elsewhere, apply to afford a rule for the present case. Because, even supposing that the captain is bound by his covenant to bring back the lead for the 2700*l.*, it is nothing more than a contract to bring back a certain quantity of goods, not indeed according to a rate of freight proportioned to any certain bulk or weight, but merely as a waggoner might agree for a gross sum to carry goods in his own waggon from *London* to *Exeter* or

(*a*) *Shepherd* stated the reason of this to be, that the charter-party copied the terms of the licence obtained, which were to return to *London* or any other port in *England*.

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elsewhere. Now considering this as a mere contract to bring certain goods to *England*, I see no reason why the captain may not earn what else he can by taking other goods on board for his own benefit. In common cases of charter-parties, there usually is a covenant that the freighter will supply a certain quantity of homeward freight at the foreign port, and if he does not, the Plaintiff has his action on the covenant against him. But suppose, instead of leaving the damages open, he stipulates, if I cannot provide a cargo for you, I will pay you so much, would not the owner in that case have a right to take goods on board for his own account? His ship is at full liberty for him to make any other profit of, and in such a case he doubtless would insist on more or less liquidated damages, according to the chance he foresaw of getting freight home from the place where he was going: he would raise or lower his demand accordingly: and in such case I see no reason why the person who had stipulated to pay such liquidated damages, should be discharged from any part thereof on account of the profit which the Plaintiff might make by the cargo supplied by any other person. I was at first much staggered by the case in the court of King's Bench, which is very similar; but there the captain did not bring home the lead, but instead thereof went to *Stockholm*, and there sold the lead, and got other goods and brought them home. The Plaintiff there called on the insurers on a very singular insurance, not of the ship, freight, or goods, but it was this; we the underwriters agree to pay a total loss in case the ship is not allowed to load a cargo at *Petersburgh*. This was in effect an insurance of the voyage; there Messrs. *Puller* demanded the sum of 2500*l*., thinking they were bound to pay that to the owner; but it was said for the Defendant, no, he is not obliged to pay the whole, but the whole, deducting the freight which the captain obtained at *Stockholm*. This strong difference subsists between

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tween the two cases: there the lead was the property of Messrs. *Puller*, but the lead was not brought back, it was sold at *Stockholm;* and for aught that appears, the means which the captain had of obtaining any freight at *Stockholm*, might arise from the use he made of the lead there: and on that account, perhaps, the Court of King's Bench might think that the captain, who had not been authorized or directed to act thus, but had done all this for his own benefit, should not be entitled to that profit, leaving the underwriters to pay the whole 2500*l.* But in this case, on the best consideration, we think that the Defendants are not entitled to deduct from the 2700*l.* the profit which the captain made. Something was said, that if a full return cargo had been provided, the Plaintiff would have got more than he will now get by the 2700*l.* together with this freight; but the Plaintiff has said, pay me what you would have paid if a full return cargo had been obtained at *Petersburgh*, and I will allow the return freight out of it. I do not know how that would leave the balance; it is a matter of calculation; but however since it has been rejected, the Plaintiff is entitled to his 2700*l.* The rule therefore which has been obtained for reducing the damages from 3121*l.* 16*s.* 6*d.* to 618*l.* 13*s.* 9*d.* by deducting the return freight, must be

Discharged.

The Plaintiff having entered up judgment for the sum of 3121*l.* 14*s.* 6*d.* found by the verdict, *Best* Serjt. on this day moved that the judgment might be restrained to the sum claimed by the bill of particulars, which was a balance of 1617*l.* 11*s.* only. If it had been understood at the trial, that the Plaintiff was proceeding to recover a greater sum than this, he would not have been permitted so to do. He will now obtain as the whole produce of his voyage 5523*l.* 16*s.* whereas if the Defendants

ants had supplied him with a full return cargo, he could not have been entitled to more than 4019*l.* 12*s.* 6*d.*

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The Court observed, that in an earlier stage of the cause the Defendants had rejected the Plaintiffs' offer to put the case on the same footing as if they had provided a full homeward cargo, and they must now abide by their election. It was hard enough to tie up a Plaintiff at the trial by his particular; and although he had here gone beyond it, he had obtained no more than the judgment of the Court gave him, and no injustice was occasioned by the excess: they therefore rejected the application.

CRUICKSHANK *v.* JANSON.

May 9.

Under a policy at and from an island, a ship is protected in moving from port to port in the same island.

THIS was an action brought upon a policy of insurance "at and from *Jamaica* to *London*." The ship was "warranted to sail after the 12th of *January*, and on or before the 1st of *August*." Upon the trial of this cause at *Guildhall*, at the sittings after *Hilary* term, before *Mansfield* C. J. it appeared that the vessel was at anchor at port *Maria*, in the island of *Jamaica*, for the purpose of taking in her cargo. Port *Maria* is considered as a very hazardous station for ships; and as soon as the vessel was completely loaded, and before the 12th of *January*, the master sailed for *Port Antonio*, an accustomed rendezvous in the same island, intending to wait there for convoy. In going thither the ship was lost. The Defendant at the trial contended that the moving and putting the ship within the dangers of the sea before the 12th of *January*, was a breach of the warranty, which put her out of the protection of the policy. The jury, however, found a verdict for the Plaintiff.

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Lens Serjt. now moved to set aside the verdict and have a new trial, upon the ground that this was not a loss within the policy: but the Court held that there was no ground for the motion, and that under the word *at*, a ship moving from one port to another in the same country is protected, and they refused to grant the rule (*a*).

(*a*) *Camden* v. *Cowley*, 1 *Bl.* 417. *acc.*

May 10.

SUTTON *v.* BUCK.

Possession of a ship under a transfer, void for non-compliance with the register acts, is a sufficient title in trover against a stranger for parts of the ship being wrecked.

Possession under a general bailment, is a sufficient title for a Plaintiff in trover.

The Plaintiff bought and paid for a ship stranded on the *English* coast, but the transfer was not regular: he tried to save her, bnt she went to pieces; the Defendant possessed himself of parts of the wreck, which drifted on his farm: held that the Plaintiff's possession enabled him to recover for them in trover.

The lord of a manor is not entitled to salvage for taking, against the consent of the owner, and preserving, parts of a ship thrown on his manor, when the servants of the owner are there to take care of it for him.

THIS was an action of trover for divers quantities of timber, wood and materials. It was first tried at the *Norfolk* summer assizes 1809, before *Mansfield* C. J., when the Plaintiff's case appeared to be this. The ship, *Spring*, with her cargo, belonging to *Gardiner*, a merchant in *London*, was stranded on the *Blakeney* Sands on the *Norfolk* coast. *Gardiner* went thither and succeeded in saving the cargo. On the 1st of *March* by agreement, partly in writing, and partly in parol, he sold the vessel as she lay, being then a complete hull, to the Plaintiff for 600*l.*, which the Plaintiff paid him. *Gardiner* sold her as a ship. A bill of sale was executed, but it could not be proved at the trial, on account of the absence of the attesting witness, nor was there any evidence of a registration, in compliance with the regulations of the register acts. The Plaintiff for some days superintended the la-

bours

bours of 18 men and two carpenters, whom he kept on board from the 2d of *March* till the 18th, constantly employed in endeavouring to get the ship off, and with considerable hopes of success; but at the end of that time the ship went to pieces. He then by his agents endeavoured to preserve the wreck, and advertised it for sale by auction; some pieces of it floated away, and a part drifted on the Defendant's farm, where the Defendant collected it, and carried it home in carts; the Plaintiff's agents claimed it, and the Defendant refused to deliver it, but said he should carefully preserve it for the rightful owner. There was evidence that the Defendant broke up those parts of the wreck in an unskilful and injurious manner, by sawing off the beams. *Mansfield* C. J. nonsuited the Plaintiff, without any question respecting the damages thereby occasioned, upon the ground that the vessel was sold as a ship, and that registration of the transfer was necessary to confer any title on the Plaintiff.

Sellon Serjt. in *Michaelmas* term had obtained a rule *nisi* to set aside the nonsuit, and have a new trial, upon three grounds. 1st, That this was a wreck, and not a ship within the scope of the register acts, and that registration of the transfer was therefore unnecessary. 2dly, That in trover it was unnecessary for the Plaintiff to prove any title at all, for that a Defendant in trover is by law presumed to be a wrong doer till he shews the contrary. 3dly, That even in an action founded on a contract, it would not be necessary to produce this evidence; but if it were necessary to shew any title, the bare possession, which was proved to be in the Plaintiff, was title sufficient.

Peckwell and *Frere* Serjts. in *Hilary* term shewed cause against this rule. This was a perfect ship when sold, as the

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the Plaintiff by his own case, and by his acts has admitted: for 16 days after the sale he was in possession of her as a ship, and treated her as such with great hope of saving her; and the adventitious circumstances of narrow tides, and adverse winds which occurred some weeks afterwards, cannot alter the state of things which subsisted at the time of the sale. If registration was not necessary in this case, it will follow that it is never necessary, unless at the time of the sale the ship be afloat, seaworthy, completely well found, and in no state of immediate peril. No other line can be drawn. This case is not within the indulgence granted by 34 *G.* 3. *c.* 68. *s.* 16. on which it will perhaps be contended, that this ship never returned to port, and that therefore the ten days after her return, within which the transfer must be registered, never began to run; for by reference to the antecedent words of the section, it appears, that the latitude of ten days is given only when the ship is absent, *so that an indorsement or certificate cannot immediately be made*, but here no such impossibility subsisted; for the buyer and seller were both on shore on the spot, with access to the ship's certificate, and both might have registered it, and the indulgence was therefore not necessary. There are also other requisites not at all dependent on her return to port: by *s.* 14. every transfer must be in writing; this agreement was partly in writing, and partly by parol. In 2 *East*, 399. *Moss* v. *Charnock*, it is held that the title vests in the vendee only from the time of complying with these requisites. 2dly, The possession is not sufficient title. The cases of *Moss* v. *Mills*, 6 *East*, 145., *Robertson* v. *French*, 4 *East*, 130., *Camden* v. *Anderson*, 5 *T. R.* 709., *Thomas* v. *Foyle*, 5 *Esp.* 88., relate to the point. The registration of the transfer is not required with a view to the security of the title of individuals, but for purposes of public policy, and the statute makes the transfer void, not as between the parties only, but as to all the world, as to any one

against

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against whom the Plaintiff may declare in trover. This was fully settled in the case of *Westerdell* v. *Dale*, 7 *T. R.* 306., which arose soon after the passing of the act, the intent of which is well stated there in the judgment of *Grose* J.: but the end of the statute would be defeated, if such a transfer as this would suffice: and the question can hardly arise in any case at all, if it is not competent to discuss it in trover, for the title to ships is more usually tried in that form of action than in any other. In trover the possession is only important as affording a presumption of property; but, like any other presumption, it may be rebutted; and here it is rebutted, by the Plaintiff expressly shewing that the ship is the property of *Gardiner*. Independently of the register acts, a ship is a species of property, the transfer of which cannot be evidenced except by written documents; it is the largest and most valuable species of moveable property; it does not pass by mere delivery, as it has often been held in the case of part owners; and there is no market overt for ships. With relation to the effect of the register acts, a new trial would be useless to the Plaintiff; for it would not enable him to prove that he was entitled to the ship on the 21st of *March*, when the cause of action arose; because in *Moss* v. *Charnock* it has been decided that the title accrues only from the time of complying with the requisites of the register act, which had not then been done: and to hold that trover could be maintained upon the possession, when it is thus accounted for, would entirely overthrow the cases of *Westerdell* v. *Dale*, and *Camden* v. *Anderson*. *Robertson* v. *French* does not affect the case, for that was a question whether the Plaintiff had an insurable interest; but there may be many insurable interests short of the absolute property in a ship. Besides, the authority of *Camden* v. *Anderson* was not cited in that case; consequently, it must not be considered as overruled thereby. Nor can the Plaintiff stand on any supposed special property,

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property, because on his own shewing, he claims the absolute property, and not a special property. If therefore this action can be at all maintained, it must be on the Plaintiff's possession of the materials, not of the ship; but the Defendant, when he came to his case, would have proved, that, on the 21st of *March*, the possession was not in the Plaintiff, but in the Marquis *Townshend*, the lord of the manor on which the wreck was thrown, and whose tenant and bailiff the Defendant was. It therefore cannot avail the Plaintiff again to carry this case to a jury.

Sellon, *contrà*. The question is decided by the situation of the parties: the Defendant is a mere stranger and wrong-doer, against whom the action of trover may well be supported on the possession, without any title in the Plaintiff. Secondly, if this were an action arising on a contract, the Plaintiff has sufficient title to enable him to recover. 2 *Williams*'s *Saund.* 47. *Wilbraham* v. *Snow*; the note of the learned editor gives a full view of the grounds on which trover may be maintained. It lies either on an absolute or on a special property. If the Plaintiff had not the absolute property, at least he stood here as the agent or bailiff of *Gardiner*, and on that special property he may maintain trover. "So possession with an assertion of property, or even possession alone, gives the possessor such a property as will enable him to maintain this action against a wrong-doer; for possession is *primâ facie* evidence of property. 1 *Salk.* 290. *Blackham*'s *case*." If this were not so, a felon could not be convicted on an indictment, without proving the prosecutor's title to the goods stolen. But the principle of law is, that a mere wrong-doer shall never in any case dispute the possessor's title. 1 *East*, 244. *Graham* v. *Peat*. In trespass the Plaintiff was in possession under a mere void lease of a rectory; but it was held that the possession

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session was sufficient as against a mere wrong-doer. It is not therefore enough to shew that somewhere else resides a stronger title. [*Mansfield* C. J. asked, since it was clear that *Gardiner* could recover in trover for these materials, how should the damages be apportioned if the Plaintiff also could recover? In the old action of detinue, if two sued a bailee for the same charters, he might pray that the Plaintiffs might interplead.] The Defendant might in that case plead the first recovery in bar of the second action, averring that it respected the same identical goods; and as to the measure of damages, whoever recovered first should recover the full amount; for, if it were the bailee, he is answerable over to the other, and the recovery might be pleaded against the other: or it might be given in mitigation of damages: but if not, yet in many cases a man by his own misfeasance subjects himself to two actions for the same matter. *Basset* v. *Maynard*, *Cro. El.* 819., and *Rackham* v. *Jesup*, 3 *Wils.* 332. are also authorities to shew that the possession is sufficient. Supposing that the transfer of the ship was void, yet at the moment when she went to pieces, it ceased to be a ship; but at that moment, and afterwards continually until the act complained of, the Plaintiff had possession of the wreck, and the absolute property in it, as goods which he had bought, paid for, and was in possession of, though he was before merely the bailee of *Gardiner*, as to the ship.

MANSFIELD C. J. Suppose a man gives me a ship without a regular compliance with the register act, and I fit it out at 500*l*. expence, see what a doctrine it is that another man may take it from me, and I have no remedy. The only doubt on the case, I think, arises from the register act, lest if we should decide that any property passed by the transfer, it should militate against that act; and I have never been able entirely to free my mind from that

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that doubt; but at present, I think, that, on the circumstances, the Plaintiff might maintain trover. The case is this: here is a ship stranded: she is certainly considered by all parties as a ship belonging to *Gardiner*: he does not think her worth taking much trouble about; he sells her to *Sutton*, who thought her an advantageous purchase at 600*l*., and who puts on board eighteen men for the purpose of getting the ship off, having a hope that she might still be saved and used as a ship. There had been a bill of sale, but no registration; but as to the bill of sale, the transaction was void, both because there was no written transfer proved, and no registration: and it struck me on the trial, that no property passed thereby to the Plaintiff, because the delivery was made to him as to an absolute vendee. But, however, it is clear that *Gardiner* did deliver her to the Plaintiff, with intent that the Plaintiff should have her and keep her, he was, in every sense of the word, in possession of the ship; he being in possession, the Defendant saws and cuts some parts of the wreck; not, I suppose, with a view of doing mischief, but, as he himself says, with an intent to keep it for the owner, whoever he should be. Now thus the title stands, as it was proved at the trial. If mere possession will make property, to be sure here is possession, taking it without reference to the register act. If *Gardiner* had said, I give, or I abandon the ship to you, and the Plaintiff had said, I will endeavour to save her, and had laid out great sums of money, and failed, might a stranger come and take possession of a part? it would be a monstrous thing to say that he could so do. Here the case is stronger; for in all equity and conscience the Plaintiff is the vendee, and has paid his money. Now is this in any degree different from other cases of special property? The register acts have not said that a man shall not give a ship; and it seems strange to say that a gift by *A.* to *B.* should be defeated by *C.* I do not see how the payment of the mo-

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ney makes this transfer to differ from a gift in that respect; and though the Plaintiff fails to establish a complete title to the ship, on account of the non-compliance with the register act, yet that question is to be disputed only between *Gardiner* and the Plaintiff; and it would be a strange thing to say, that the Defendant can take possession. In *Westerdell* v. *Dale*, the person to whom the ship was conveyed, had suffered his former partner to continue to manage it; so that as to all the world, the former partner continued owner.

LAWRENCE J. There is enough property in this Plaintiff to enable him to maintain trover against a wrong-doer; and although it has been urged, that the contract is void with respect to the rights of third persons as well as between the parties, yet as far as regards the possession, it is good as against all except the vendor himself. There is a difference made in the books between a wrong-doer and one acting under colour of a title. In the case of *Armory* v. *Delamirie*, 1 *Str.* 505. the bare possession was held sufficient in order to recover against a wrong-doer; yet that boy had no more title to the jewel than the Plaintiff to this ship; and though the Plaintiff had no absolute property as against *Gardiner*, yet he claimed under *Gardiner*, and had the possession against those who tortiously took the goods without colour of right. I am of opinion that the nonsuit should be set aside.

CHAMBRE J. expressed the same opinion. Here the Plaintiff has possession under the rightful owner, and that is sufficient against a person having no colour of right. An agister, &c. a carrier, a factor, may bring trover: even a general bailment will suffice, without being made for any special purpose, but only for the benefit of the rightful owner. Here is a general bailment. It would be monstrously inconvenient if a wrong-doer could come

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and take things out of the possession of him who had the possession under the rightful owner. I am of opinion that the nonsuit should be set aside. I say nothing about the measure of damages; it is not necessary to decide that here.

Rule absolute.

The cause was again tried at the *Norfolk* spring assizes 1810, before *Grose* J. where the Plaintiff recovered a verdict for 200*l.* damages: and *Peckwell* on this day moved to set it aside upon two grounds. First, the evidence was, that two or three thousand pieces of the wreck were cast on the shore of the manor, whereof the Marquis of *Townshend* was the lord, and the Defendant was bailiff, and on another contiguous manor; and two large pieces were fast in the sand. The Defendant first collected the smaller pieces, and lodged them in the manor pound; and he received both from the Plaintiff's agents at the time of the transaction, and from his counsel at the trial, the highest praise for his zeal and diligence in this work; so that there was originally, he said, a clear assent to the act; and it was not until the Defendant began to break up the larger pieces in a manner which the Plaintiff's agent disapproved, that any dissent was expressed; and for that cause only did the Plaintiff bring his action. The Plaintiff gave evidence at the trial that the parts were carelessly and unskilfully separated; but under the circumstances the object was not so much to save the wreck in the best possible manner, as to save it at all. The learned judge directed the jury that there was no pretence to call this a wreck; but if it were not such a wreck as became absolutely forfeited, and the property of the lord, yet it was such a wreck as the lord was bound by law to interpose and take care of, and on which he therefore had a lien for salvage; and it was not proved that any salvage had ever been tendered for the preservation of the

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two larger pieces. There is a material distinction between that species of wreck, which, by having lost all marks of ownership, is absolutely forfeited, and that which the lord or his grantee is bound, upon claims made by the owner within a year and a day, to restore. The stat. 3 *Ed.* 1. *c.* 4. is, "Concerning wrecks of the sea, it is agreed, that where a man, a dog, or a cat escape quick out of the ship, that such ship nor barge, nor any thing within them shall be adjudged wreck: but the goods shall be saved and kept by view of the sheriff, coroner, or king's bailiff, and delivered into the hands of such as are of the town, where the goods were found; so that if any sue for those goods, and after prove that they were his, or perished in his keeping, within a year and a day, they shall be restored to him without delay; and if not, they shall remain to the king, and be seized by the sheriffs, coroners, and bailiffs, and shall be delivered to them of the town, which shall answer before the justices, of the wreck belonging to the king. And where wreck belongeth to another than to the king, he shall have it in like manner." This distinction is still more strongly marked in the case of *Hamilton* v. *Davis*, 5 *Burr.* 2732., which was trover for casks of tallow: the Defendant contended that as nothing quick escaped from the ship, the wrecked goods were absolutely forfeited; but the casks being branded and marked, the Court held that they were preserved to the Plaintiff by those indicia of ownership. Much was in that case said about *known* ownership; and the distinction was acknowledged, that where the owner is not known, the goods belong to the lord: where they are known, the owner when discovered may claim them: but it can hardly be law, that if two casks come on shore, the one marked and the other not marked, the lord is bound to preserve that which is marked, and is at liberty to abandon the other: and if he is bound to preserve that of which the owner is unknown, he has a lien for the salvage. *Ni-*

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cholson v. *Chapman*, 2 *H. Bl.* 257., it was admitted by *Eyre* C.J. that salvage would be due for goods lost by the perils of the seas, though not for goods, which accidentally floated away in a navigable river. Secondly, the Defendant had one entire right to save the whole of this wreck, and the Plaintiff could not restrain his right to the saving the parts which he could not himself preserve, and forbid him to touch that which the Plaintiff could save. He acquiesced in the Defendant's act, and the acquiescence goes to the whole. If the Defendant once began to save the ship, he was entitled to save the whole. [*Mansfield* C. J. You state it as a duty incumbent on the lord to save the wreck: where do you find that duty? I consider it not as a duty, but as a mode prescribed by which the lord shall entitle himself to the property in case the owner does not claim it. Would any action lie against the lord for not saving wreck?] *Peckwell* contended that it would. [*Lawrence* J. Did you ever hear of such an action?] In this case the owner was unknown to the Defendant until two days after the ship was entirely destroyed.

MANSFIELD C. J. The Plaintiff's agents were employed about the ship: he had men on board working on her before she went to pieces. Though the Defendant might not know the owner, it was sufficiently notorious in the neighbourhood who the owner was.

LAWRENCE J. See to what length that argument would go! We should have lords of manors going on board vessels and saying, "Here is a crew on board, but I know not the owner; and I will therefore break the ship to pieces." All would be violence and outrage.

Rule refused.

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RUDING v. MANNING.

May 12.

Affidavits of the acknowledgments of fines and recoveries taken abroad, must be authenticated by a notary public: but if a foreign notary makes this rule an instrument of extortion to draw *British* property into an enemy's country, the Court will dispense with the notarial certificate. But it must be upon affidavit of the circumstances.

BEST Serjt. moved that a fine might pass under the following circumstances. *Tindal*, one of the conusors was detained a prisoner at *Verdun* in *France*; the notary public to whom he applied there, refused to put his attestation to the instrument, unless the conusor would pay him a large per-centage on the value of the lands conveyed. This *Tindal* refused; he swore the affidavit before a person named *Paron*, at *Verdun*, and it appears by an affidavit now produced, and made by a banker now in *London*, that *Paron* is a justice of the peace resident at *Verdun*, and authorized to administer an oath. The extortion of the notary appears by the certificate in writing of *Tindal* the conusor himself.

The Court held that this was insufficient: if an affidavit of this fact, as well as of the acknowledgment, had been made by the conusor before the same magistrate, it might have sufficed; but any motion to dispense with the usual practice of the Court, must be bottomed in an affidavit of the circumstances which take the case out of the general rule, and in this instance there is no such affidavit.

Rule refused (*a*).

(*a*) HEATH J. was absent this day.

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May 12.

If the proximate cause of damage be the Plaintiff's unskilfulness, although the primary cause be the misfeasance of the Defendant, he cannot recover.

At least if the mischief be in part occasioned by the misfeasance of a third person not sued.

A. placed lime rubbish in a high-way, the dust blown from it frightened the horse of *B.*, and nearly carried him into contact with a passing waggon, in avoiding which he unskilfully drove over other rubbish placed in the road by *C.*, and was overthrown and hurt: held that upon a count stating these facts *B.* could not recover against *A.*

Flower *v.* Adam.

THIS was an action upon the case. The declaration contained three counts, the first of which stated that the Defendant unlawfully placed and kept until the time of the grievance, upon the common highway, a large quantity of lime, lime rubbish, and dust, *by means whereof* divers large quantities of lime, and other dust and light particles were raised by the wind and air, and blown over, upon, and about the highway, *by means whereof* the Plaintiff's horse, drawing his chaise along the highway, was so frightened, that he ran and dragged the chaise over a certain other large heap of rubbish then lying and placed in the said highway, *by means whereof* one of the shafts of the chaise was broken, and the horse being further alarmed *thereby*, ran and dragged away the chaise, with the shaft thereof so broken, with great speed and violence, *by means whereof* the Plaintiff was thrown with violence out of the chaise, and greatly cut, bruised, and wounded, and his chaise was damaged, and the Plaintiff, *by means of the premises*, also became very ill, &c. The second count stated, that the Defendant wrongfully placed and kept upon a public highway a large heap of rubbish, *by means whereof* divers large quantities of dust, and other light particles, were raised and blown about by the wind and air, and issued therefrom, and were carried about and over the said highway, *whereby* the Plaintiff's horse, which he was then driving upon the highway in a certain chaise, was so startled, that he ran and carried the chaise with great force and speed across the highway towards a waggon then and there passing, to the great and imminent danger of the Plaintiff, who was then in the chaise; whereupon the Plaintiff, in order to avoid

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avoid being carried and forced against the waggon, endeavoured to pull and bring the horse round to the other side of the road therefrom; and in so doing, and endeavouring to avoid the imminent danger of and from the waggon, the chaise was forced and carried upon and over a certain other heap of rubbish or dirt then placed and being in the highway, *whereby* one of the shafts of the chaise was broken, and the horse so terrified *thereby*, that he ran off with the chaise with great speed and violence, *whereby* the Plaintiff was thrown out of the chaise with great violence, and greatly wounded, and the chaise was broken, and the Plaintiff became ill, &c. The third count stated that the Defendant wrongfully and unlawfully placed and kept a quantity of lime and other rubbish at the side of and upon a public king's highway, from which rubbish there was raised and blown about by the wind, a great cloud and quantity of lime, and other dust and light particles, *by means whereof* the Plaintiff's horse, then and there drawing his chaise along the highway, was so startled that he ran away with the chaise with great violence, *and by means thereof* the Plaintiff was thrown from the chaise, and was wounded, and the chaise was broken; and by means of the premises, the Plaintiff became sick, was prevented from transacting his lawful business, and was obliged to expend money in his cure. Upon the trial of this cause at *Westminster*, at the sittings after last *Hilary* term, before *Mansfield* C. J., the evidence was, that some bricklayers employed by the Defendant had laid 14 barrows full of lime rubbish before the Defendant's door; the Plaintiff was passing in a single horse chaise; the wind did raise a whirlwind of this lime rubbish, and that frightened the horse, which usually was very quiet: he started on one side and would have run against a waggon which was meeting them, but that the Plaintiff hastily pulled him round, and the horse then ran over a lime heap lying before another man's door:

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by the shock the shaft was broken; and the horse being still more alarmed by it, ran away and overset the chaise, and the Plaintiff was thrown out and hurt. *Mansfield* C. J. was of opinion, that the allegations in the first and third counts were not substantiated, and that the charge in the second count was nearer the real case, and upon that count he directed the jury, that if the mishap was occasioned either by pure accident, or owing to the Plaintiff not being a very skilful charioteer, the Plaintiff was not entitled to recover: if the placing of the lime rubbish before the door was no more than a person would do in the usual course of business, it might be considered as a mere accident: if there was blameable negligence, they would find for the Plaintiff. The jury found a verdict for the Defendant.

Shepherd Serjt. now moved that the verdict might be set aside and a new trial had, on account of a supposed misdirection of the Chief Justice. If the Defendant was to blame in the first instance in placing the rubbish there, it is not enough for him to say that if the Plaintiff had not pulled his horse quite so hard he would have escaped the danger: the law is not made merely to protect the most skilful, but all the king's subjects indiscriminately. If the trap-door of a cellar be left open, a child may easily fall into it; but it is not therefore innocent because a vigilant and active man may avoid it. Nor is the multiplication of dangers arising from the acts of several persons an excuse; for if it were, the person who placed the second heap of lime rubbish might equally say, it was not my heap that caused the injury, but the dust which blew from the Defendant's heap. The cause of the mischief which happened in the Plaintiff's turning suddenly to avoid the waggon, is the putting the first heap of rubbish in the road; it cannot be attributed to accident, and it ought not to have been left to the jury to decide, whether

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ther the placing rubbish in the road, which was a criminal nuisance, was a matter of accident or not. In *Bush* v. *Steinman*, 1 *Bos. & Pull.* 404. it was held that a Defendant who had employed workmen, who placed rubbish in the road, was answerable for the damage sustained by a Plaintiff who was thereby overturned.

MANSFIELD C. J. I believe I told the jury, that if they thought the Plaintiff's running against the second heap of rubbish was owing to his not being able to manage the horse, they should find for the Defendant. But is not this too remote to affect the Defendant in this action? Here is a heap of rubbish: the dust rises from it; the horse runs towards a waggon, and the driver, without necessity, that is, without the necessity of turning his horse so violently as he did, pulls him that way. I rather think it is either accident, or inability in the driver.

LAWRENCE J. The immediate and proximate cause is the unskilfulness of the driver.

The Court refused the rule.

SOLOMON v. BEWICKE. *May* 15.

In an action of covenant on an insurance against fire, a tender may be pleaded and money paid into court under 19 *Geo.* 2. *c.* 37. *s.* 7.

THIS was an action of covenant against the Defendants, who were members of the *Sun* fire-office, upon a deed poll containing a policy of assurance against fire. The Defendants pleaded, that the damage sustained amounted to 100*l.* and no more, and averred that after they had notice of the loss, they tendered that sum, and they paid the money into court. The Plaintiff took out the money, and took issue on the amount of the damage: Upon the trial of the cause at *Westminster*, at the sittings

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after the last *Michaelmas* term, before *Mansfield* C. J., the jury found a verdict for the Defendants.

Shepherd Serjt. in *Hilary* term obtained a rule *nisi* for arresting the judgment, upon the ground that the action being brought to recover uncertain damages, a tender could not be pleaded at common law, and that the statute 19 *G*. 2. *c*. 37. *s*. 7., which enables the Defendant in marine policies to pay money into court, did not extend to this species of policy: he admitted that the right to plead a tender and to pay money into court were convertible, and observed, that the Court upon that ground had permitted a tender to be pleaded in cases of marine policies. The preamble of the seventh section recites the hardship of putting the Defendants to costs in actions upon *such* policies, which, by reference to the foregoing sections, is found to be policies on ships, no other policies being therein described; and the whole purview of the act is to regulate marine insurances. Before this act, as therein is truly recited, Defendants on policies could not bring money into court nor plead a tender. *Anon*. 11 *Mod*. 270. It was held that a tender was not admissible on a policy of insurance. But in *Johnson* v. *Lancaster*, 1 *Str*. 576. the Court held on demurrer that a tender might be pleaded to a *quantum meruit*. In 2 *Bos*. & *Pull*. 234., *Fail* v. *Pickford*, in *assumpsit* against a carrier for goods lost by sinking in a barge, the Defendant was not permitted to pay money into court.

Lens Serjt. now shewed cause. The Plaintiff is not to be allowed first to put the money in his pocket, as he has done, and then to object to the sufficiency of the plea under which he accepts it. [*Lawrence* J. The act of the parties cannot make that to be a good plea in law which is not such.] The words of the seventh section are general, and apply to policies of insurance against

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fire as well as other policies; and all insurances, whether marine or against loss by fire, are equally within the mischief. It is equally dangerous and inconvenient in the one case as in the other that a Defendant who is willing to pay what is justly due, should be compelled to go on. It is incumbent on the Plaintiff to shew that the case is not within the mischief. The same Defendants have in other cases repeatedly pleaded the same plea, but the legality of it has never come into question. It was first advised some years since by *Bayley* J., then at the bar.

Shepherd and *Best* Serjts. in support of the rule. This is not cured by verdict, and as the objection appears on the record, the Court is bound to arrest the judgment. The whole purpose of the act is to facilitate the maritime commerce of *Great Britain*: the title confines it to that object. It sometimes happens that matters totally distinct are comprehended in one act of parliament; but where the subject matters are at all cognate or connected, as here they are, the act must be confined to the subject matter which the title and preamble purport to regulate. The eighth section, exempting from the operation of the act persons resident in *Turkey*, &c. decisively proves this: that clause cannot apply to fire insurances.

MANSFIELD C. J. How does the seventh clause, construe it as you will, relate to marine insurances, or regulate them? It is quite out of the title of the act. It probably occurred to some person while the act was pending in parliament, that it was a very hard thing that Defendants could not pay money into court in actions on policies, and he therefore inserted this clause. It has nothing to do with the purview of the act. The mischief is

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exactly the same in the cases of marine and of other insurances, and possibly the person who framed the clause might have that in his contemplation; and it is hard to believe that there would not have been by this time another act of parliament to redress this grievance, if it had not been apprehended that the existing law already applied to it. If the counsel for the Plaintiff wish to take time to enquire into the practice of other insurance offices, and can find any thing in the course of the present term to alter our judgment, let it be mentioned to us; but here is a clause, certainly general, and the words are large enough to extend to all policies of assurance: the Plaintiff himself in his declaration calls the Defendant's deed poll a policy of insurance: and the question is, whether there be any thing in the act which necessarily confines it to marine insurances. The general purview of the act relates certainly to marine insurances; but how many cases are there, as it has properly been admitted, where acts of parliament extend to things wholly foreign to their purview!

HEATH J. I am of the same opinion. The mischief is the same in both cases, and the law is the same; and the exposition of cotemporaneous usage favours this construction. As to the last clause, *reddendo singula singulis*, it applies only to such parts of the act to which it is applicable.

CHAMBRE J. The words are plain and unambiguous, and there is nothing in the statute which necessarily confines it to the case of marine insurances.

LAWRENCE J. Unless there is something in the act which necessarily compels courts of justice to restrict its operation to marine policies only, they must construe it

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as extensively as the mischief, and there is as much reason to have money paid into court on a fire insurance as on any other.

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Rule discharged, unless stronger reasons in favour of it should be adduced within the term.

The case was not again mooted.

COLLINS and WALLER v. NICHOLSON.

May 15.

An attorney's bill for obtaining a bankrupt's certificate, must be signed and delivered a month before he can sue thereon.

Obtaining the Lord Chancellor's signature is business done in a court.

THIS action was brought by the Plaintiffs to recover the amount of their bill for business done by them as solicitors for the Defendant, who had been a bankrupt, in obtaining his certificate. Upon the trial of the cause at the sittings after last *Michaelmas* term at *Guildhall*, before *Mansfield* C. J., the Plaintiffs obtained a verdict for the amount of their demand: but an objection was then taken, upon which also *Best* Serjt. in *Hilary* term obtained a rule *nisi* to set aside the verdict, and enter a nonsuit, that the bill, which had been delivered by the Plaintiffs to the Defendant, had not been signed by them pursuant to the statute 2 *G.* 2. *c.* 23. *s.* 23.

Shepherd Serjt. now shewed cause against this rule. This species of business is not business in any court of law or equity, nor subject to taxation by the officer of any court, and therefore the statute does not apply to it. This is neither business done for the petitioning creditor, the costs of which, up to the time of the choice of assignees, which by 5 *Geo.* 2. *c.* 30. *s.* 25. is to be paid by the petitioning creditor, and is taxable by the commissioners of bankrupt, nor is it of the description of such subsequent costs as by sect. 46. are directed to be paid by the assignees,

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Collins and Another v. Nicholson.

nees, and are to be taxed before the master. This is business done for the bankrupt in applying to his creditors, and to the Lord Chancellor, in order to get his certificate signed by them: and none of the statutes passed respecting bankruptcy at all apply to it. Since this statute expressly gives the master authority to tax the costs, it is to be inferred that he derives it from this only, and did not before that act possess it, and the act certainly does not extend to this case.

Mansfield C. J. That is true; and that circumstance for a time begat doubts in the Chancellor, whether he could issue an attachment in such a proceeding; but it is now settled that he can: and it is very reasonable that it should be so, otherwise it would be in the power of an attorney to plunder a poor bankrupt, and he would have no redress: but it is now decided that all proceedings by petition to the Chancellor are proceedings in Chancery; and causes of the utmost magnitude and importance come on in that shape; and this is a proceeding in the cause, and taxable by the master. I should have thought that the business done under the commission would, without the aid of the statute 5 *Geo.* 2., have been taxable by the master. In ordinary cases assignees have only to get in debts under the commission, and have no business before the Court; but here is a proceeding in court. An application must be made to the Chancellor to have his signature to the certificate; and it has long been settled, that where a bill contains one item which is a proceeding in a court, all the residue of the bill, though it be even a bill merely for conveyancing, is taxable.

The Court unanimously concurred in making the rule for a nonsuit

Absolute.

Best in support of the rule.

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May 15.

HOLMES v. KERRISON.

No debt accrues on a bill payable after sight, until it is presented for payment. Therefore the statute of limitations is no bar to such a note, unless it has been presented for payment six years before the action commenced.

THIS was an action directed by the Court of Chancery. The Defendant was a banker at *Norwich*, and had failed: the Plaintiff had some years since deposited money with him, for which she held his promissory notes payable at a certain number of days after sight, and bearing 3 *per cent.* interest. Upon these notes the action was brought, and the Defendant pleaded the statute of limitations. Upon the trial of this cause at *Guildhall*, at the sittings after last *Hilary* term, before *Mansfield* C. J. the Defendants insisted on the statute, but offered no evidence that the bills had ever been presented for payment six years before the action commenced, and there was on the other hand some evidence that the bills were still unpaid; for the chief clerk of the banking-house produced a book, containing an account of the notes of this description which had been issued, and such of them as were paid from time to time, were marked in this book as paid: but no such mark stood against the entry of the Plaintiff's notes. The jury found a verdict for the Plaintiff.

Best Serjt. now moved for a rule *nisi* to set aside the verdict, and have a new trial.

But *The Court* were clearly of opinion, that since no debt arose upon a bill payable after sight, until a presentment for payment, and since there was no evidence that these bills had ever been presented for payment, there was no proof of a complete cause of action at any previous time, from which the statute of limitations could run; they had therefore no doubt upon the question; and

Refused the rule.

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May 17.

LLOYD *v.* ARCHBOWLE.

If arbitrators have power to examine the parties in the cause they may waive the objection taken to the competency of a witness, that he has such an interest that he ought to have been made a party.

It is no ground of nonsuit in an action on a contract, that a dormant partner, who is not privy to the contract, and is not party to the suit, partakes the benefit of the contract, and therefore ought to be joined as Plaintiff.

For such a dormant partner could not maintain the action.

PECKWELL Serjt. had obtained a rule *nisi* to set aside the award which had been made in this case, on account of the admission by the arbitrators of improper evidence. The action was brought for goods furnished by the Plaintiff, who was an ironmonger. *Livermore*, a witness, who proved the delivery and value of the goods, was the principal manager of the Plaintiff's trade: and he received for his services a certain salary, and besides that, a certain proportion *per cent.* on the profits of the Plaintiff's whole trade, and inclusively, on the profits of the demand in question. The Defendant's attorney insisted before the arbitrators, that this made the witness a partner, that he therefore ought to have been made a Co-plaintiff, and that the Plaintiff alone could not recover. The arbitrator, after further examination of the witness, awarded 28*l.* to be paid to the Plaintiff.

Marshall Serjt. now shewed cause against this rule. It might with equal propriety be contended that every broker who has a per centage on the goods he sells for a merchant, is a partner with him. Not only would the Court assume that the arbitrators had found the fact that the witness was not a partner, since they overruled the objection, and have made their award in favour of the Plaintiff; but they now expressly swear, that they were of opinion that the witness was not a partner, and the witness too expressly denies by affidavit that he ever considered himself as such. Nothing is shewn to impugn the justice of the award; and the objection to the witness, as being incompetent on account of his interest, was never taken before the arbitrators.

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Peckwell in support of his rule. The objection founded on the partnership involves the objection to the admissibility of the evidence. *Young* v. *Axtell*, 2 *H. Bl.* 242. is in point. The bills were delivered in the name of *Lloyd* and Co. and the Court will easily presume that *Lloyd* and Co. means *Lloyd* and *Livermore*: and then the objection amounts to this; that the arbitrator has examined the parties in the cause, which if he is permitted by the rule of court to do, yet it is a discretion which no arbitrator ought to exercise.

MANSFIELD C. J. The question as to the partnership was decided in the case of *Mawman* v. *Gillett* (*a*), which was

(*a*) MAWMAN *v.* GILLETT. *Feb.* 13, 1809.

A contract to do certain work within six months, and to insure from fire the employer's materials, does not bind the employer to furnish the materials within the six months.

And though by extending the time, the risk is prolonged, the Defendant continues liable for loss by fire, unless he previously abandons the contract on account of the delay.

There is no general custom of trade by which printers are bound to insure for the booksellers the paper of the works which they print.

If the ostensible proprietor of materials enter into a contract for work to be done thereon, it is not necessary that in an action brought on the contract, another, who has secretly purchased a share of him, but is no party to the contract, should be joined as a Co-plaintiff.

Nor could such dormant partner sustain an action.

Therefore the dormant partner is a competent witness to prove the contract.

THE Plaintiff declared, that in consideration that he would employ the Defendant to print certain works for the Plaintiff, on paper to be delivered by him to the Defendant, for a reasonable reward, the Defendant undertook to cause the Plaintiff to be insured against loss and damage usually insured against, that should happen to the paper by fire, whilst the same should remain in the care and custody of the Defendant by virtue of that employment; the Plaintiff then averred, that he employed the Defendant to print certain works, and delivered to him paper of the value of 5000*l.*, and that while the paper remained in his care and custody, the same was consumed by fire, in such a manner, as to be such a loss as before the time of the promise was usually insured against, and became totally lost, and was a loss usually insured against, and that *the Plaintiff at the time of the loss was interested to the amount of the said value*, and averred a breach that the Defendant had not insured. Upon the trial of this cause at *Guildhall* at the sittings after last *Michaelmas* term, before *Mansfield* C. J., the Plaintiff particularly endeavoured to ascertain a point which had long been disputed between the booksellers and the printers of the city of *London*, whether there subsisted any general custom of the trade, which bound the printers, so long as the paper delivered them for printing books continued in their possession to insure it at their own expence for the booksellers.

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was an action brought by *Mawman*, a bookseller, against the printer, for not insuring the travels of *Anacharsis*; and it appeared that several other booksellers, and amongst

The facts were, that *Mawman* had employed *Gillett* to print a Dictionary and the *Travels of Anacharsis*. *Gillett* engaged to print the latter work in six months, and to insure the Plaintiff's paper: he was to begin it in *January* 1806, which he accordingly did. *Mawman* referred *Gillett* to *Beaumont* the editor, for copy: it was not furnished so fast as the printers wanted it. *Gillett* repeatedly complained of it, and often applied both to the Plaintiff and the editor for more; but on account of a domestic affliction which *Beaumont* had sustained, the copy came so slowly, that one or two sheets still remained to be printed, when in *December* 1809, a fire happened in the Plaintiff's printing-house, which consumed the whole of these two works. It appeared that the Plaintiff had sold about 20 hundredth shares in these works to various persons, but he was the only person known to the Defendant in the contract. *Evans*, a witness who was called to prove the contract, had purchased some of the shares. It was objected that *Evans* was not an admissible witness: the Chief Justice however received his evidence, reserving the point. The jury found a verdict for the Plaintiff upon the Defendant's express undertaking to insure, but disaffirmed the existence of any general custom in the trade.

Vaughan Serjt. on a former day in this term moved for a rule *nisi* to set aside the verdict, and enter a nonsuit, upon two grounds. First, on the point reserved, that the testimony of *Evans* was inadmissible; secondly, that the Defendant was discharged by the Plaintiff's laches, in not supplying the whole of the copy within the six months, within which the Plaintiff had engaged to print it. It was a very different thing whether the Plaintiff were bound to insure for twelve months or for six; and the editor, who ought to have supplied copy faster, was the Plaintiff's servant, not the Defendant's; and after the period had expired, in which the work ought, by the mutual exertions of both parties, to have been completed, the ordinary rule would apply to this loss: the Plaintiff must bear the loss of his paper, and the Defendant the loss of his printing. The Defendant from time to time remonstrated against the delay, which was all he could do towards performing his part of the contract.

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amongst them *Evans*, a witness, had a share in the work; but inasmuch as *Evans* had never contracted with *Gillett*, but *Mawman* was the only ostensible man, the Court held, that he was the only proper Plaintiff; and with good reason: for the only acting partner might owe much money to the Defendant, which the Defendant might set off: but if the Plaintiff and the dormant partner had sued, that debt of the acting partner could not be set off. There is a material distinction between the case where partners are Defendants, and where partners are Plaintiffs: if you can find out a dormant partner Defendant, you may make him pay, because he has had the benefit of your work: but a person with whom you have no privity of communication in your contract, shall not sue you. *Young* v. *Axtell* was a case against a dormant partner

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The Court held, that as there was no proof of any express contract from the Plaintiff to the Defendant to supply the whole copy in six months, the Defendant's engagement to print it in six months was only conditional, in case the copy should be supplied fast enough, but it did not create, by inference an engagement by the Plaintiff to furnish it in that time: it would be an answer to any action that might be brought against the Defendant for not printing the work within the six months, to say that the copy was not supplied fast enough: but here, notwithstanding the delay, the Defendant went on with the printing as fast as the copy came; and so long as he continued to print, his contract to insure continued: there was no abandonment of the contract on his part, and mere complaint of the delay was not sufficient: if he had wished to exonerate himself from all further risk, he should have required the Plaintiff to take back the work.

The Court refused the rule upon this point, but granted it on the point reserved.

Shepherd and *Lens* Serjts. on this day shewed cause against the rule, which

Vaughan and *Onslow* Serjts. endeavoured to support.

The Court discharged the rule. See the reasons in *Lloyd* v. *Archbowle*, *supra*.

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partner who had an annuity. That principle has long and long ago been decided. There is nothing in the objection: the arbitrators have, by the rule of reference, liberty to examine the parties in the cause, and in many cases justice cannot be attained without it.

Rule discharged without costs.

[IN THE EXCHEQUER-CHAMBER.]

(Before eleven Judges, BAYLEY J. being absent.)

May 19.

The KING *v.* TREBLE.

The maker of ing to be payable on demand at his own abode or at a *London* banker's, and not paid at either place, is a competent witness to prove whether he has made it payable at the banker's where it purports to be payable.

The counterfeit making of any part of a genuine note, which may give it a greater currency, is forgery.

Therefore if a note be made payable at a country banker's, or at his banker's in *London*, who fails, it is forgery to alter the name of that *London* banker, to the name of another *London* banker, with whom the maker makes his other notes payable after the failure of the first.

THE prisoner was indicted in nine several counts, for the several offences of forging, uttering, and disposing and putting away as true, a certain false, forged, and counterfeited promissory note, of the following tenor; I promise to pay the bearer, on demand, ten pounds, here, or at Messrs. *Ramsbottom*, *Newman*, *Ramsbottom*, and Co., bankers, *London*. *Fordingbridge*, the 1st day of *July* 1808. For *Francis*, *John*, and *James Kelleway*. *Jno. Kelleway*. With intent to defraud *Samuel Hawkins* and *Henry Phillips*, Messrs. *Kelleway*, and Messrs. *Ramsbottom* and Co. respectively. The prisoner was tried at the *Horsham Lent* assizes 1810, before *Macdonald* C. B., when the jury found him not guilty of the forgery, but guilty on all the other counts. The evidence was, that the prosecutors, Messrs. *Kelleway* and Co. were bankers, residing at *Fordingbridge* in *Hampshire*, from whence they

issued

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issued their re-issuable notes originally made payable to bearer on demand, there, or at the banking-house of *Bloxam* and Co. in *London*: about the 14th of *September* 1809, upon the failure of that house, the prosecutors appointed another banking-house in *London*, (that of Messrs. *Ramsbottom* and Co.) at which their notes were henceforward to be paid: and caused an engraving to be made, containing merely the words "Messrs. *Ramsbottom* and Co.," and having printed these words on small narrow slips of paper, they covered the words in their notes, "Sir *Matthew Bloxam* and Co.," with these slips of new printing, which they fastened on with gum water. In *June* 1809 Messrs. *Bloxam* and Co. having paid for the prosecutors a number of these notes, amounting to about 730*l.* made them up into a paper parcel directed to the prosecutors at *Fordingbridge*, and booked the parcel at the *Swan with two Necks* in *Lad-lane*, *London*, to be sent to them by a coach; but the parcel was either lost or stolen between *London* and *Salisbury*, and it never reached the prosecutors' hands. It appeared that the note in question was one of these lost notes, of which many were found in the possession of the Defendant who passed it off, having a slip of paper bearing the words *Ramsbottom* and Co., pasted over the words *Bloxam* and Co., in like manner as the prosecutors had altered their other notes. In order to identify the note, one of the *Kelleways* was called as a witness, who proved that the parcel containing the notes so sent, was never delivered to their house; consequently that the name of *Ramsbottom* was not affixed by themselves; and the guard and coachman who accompanied the coach to *Salisbury*, proved that the parcel never arrived so far on the road as that place.

Knowles Common Serjt. for the Defendant, objected first, that this alteration did not amount to the offence of

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forgery. Secondly, that *Kelleway* was not a competent witness to prove that the alteration was not made by himself or partners. The Chief Baron overruled the objections, but respited the judgment until the opinion of the twelve judges could be had thereon.

Knowles for the prisoner. Forgery, which is not defined by the statutes, is described by *Hawkins, P. C. c. 70. s. 2. 4.* It is not clear that at the time of writing that passage the making of a false promissory note would have been a forgery. The author in explaining his definition, expressly says, that to constitute a forgery, the alteration must be in a material part of the instrument: and he cites 3 *Inst.* 169. and 2 *Mo.* 619. *Blake* v. *Allen.* In that case the obligee of a bond, conditioned for the good behaviour of his apprentice, altered the penalty from pounds to marks, and because it made the bond void, and diminished the duty to himself, the Court of Star-Chamber held it was not a punishable forgery: otherwise if he had increased the sum, or if he had diminished the sum with intent to prejudice any one. So, if a conveyance of the manor of *Dale* be altered by inserting the "beautiful" manor of *Dale*, it would be no forgery, because it is wholly immaterial. If the notes had been altered in a material part, as by accelerating the day of payment, that would have been a forgery. *Master* v. *Miller*, 4 *T. R.* 337. But not so, where an alteration in the day of payment does not accelerate it. *Jackson* v. *Piggot*, *Carth.* 459. The place of payment is not of the essence of this note; the payment of the money is the substance of the contract, and it is immaterial where it is to be paid: if it were not so, it would be necessary in every declaration upon a promissory note, to shew where it is made payable, which is not required. To make the bill good, it is only requisite that a holder should be able to resort to some solvent person. On this

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bill there is a solvent person, the house of the drawers, and they alone; for the instrument is not, nor does it purport to be, obligatory on the bankers to pay it. The criterion whether this be a forged note or not, is to see whether it is still available against the makers; and it cannot be questioned but that they are still liable thereon. Consequently, the charge of forgery is gone; for the legislature never meant to inflict death as the punishment for the intent to defraud, where the act, when completed, never can defraud, but leaves the instrument such, that after the prisoner's death, the holder may still enforce it by law. If the holder then is still entitled to recover, he cannot be thereby defrauded. If Messrs. *Ramsbottom* had paid the note, they would have become the holders, and therefore would have their remedy on the bill. The makers cannot be defrauded; for as to them, the act only goes to obtain payment of the note, and their promise to pay the money is genuine, and the place where it is to be paid is not essential to the contract. Secondly, There was no sufficient evidence to prove, that this name was affixed without the authority of the *Kelleways*. It was urged that *Kelleway* was called, not to prove the forgery, but for an indifferent purpose, to prove that the parcel of notes never arrived; from whence it would follow as a necessary inference, that the note was altered without the authority of the makers: but there is no reason in the distinction: a party who cannot be called directly to prove that the note is a forgery, cannot be permitted to do it indirectly. *Rex* v. *Bunting*, 2 *East P. C.* 996. *Adams* B. refused to permit the executor of a person whose name was forged, to prove the hand-writing of his testator, or the declarations made to him by the prisoner, on account of the interest he had as executor.

Gurney for the prosecution. Unless the principle of

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Rex v. *Bunting* be carried much further than it has hitherto gone, the objection to the evidence of *Kelleway* is of no avail. [*Mansfield* C. J. It appears that the loss of the notes was sufficiently proved by other evidence independently of *Kelleway*, for the guard and the coachman found, that when they reached *Salisbury* the parcel was gone. But *Kelleway* was not interested; for in this case *Ramsbottoms* had not paid the note. And therefore the question is not, whether if they had paid it, the *Kelleways* would have been interested in swearing that they had never authorized the payment, on the ground that a commission would be due to *Ramsbottoms* in addition to the amount of the note; but here, since *Ramsbottoms* have not paid the note, whoever might hold it, equally had a claim on *Kelleway*; and *Kelleway* was therefore disinterested.] As to the first point, the alteration in the place where the note is made payable, gives the bill a fictitious degree of credit, which it would not otherwise have; any circumstances which may induce persons more readily to accept the security of the note are material to the instrument; and therefore the counterfeiting of them is a forgery. In order to give currency to the note, the prisoner falsely represents that the makers have undertaken to pay it at Messrs. *Ramsbottoms*: had it continued payable at *Fordingbridge* only, no person at a great distance from that place, would accept the note in payment. It is said that it could not defraud the bankers: but it is a frequent case that persons are condemned for forgery in having drawn bills on bankers in the names of fictitious persons.

Knowles in reply. This is no forgery; but if it be one, *Kelleway* is not a person competent to prove it of himself, or to add weight to the evidence of others; and the Court cannot apportion the share which the testimony

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mony of the respective witnesses had on the minds of the jury in producing this verdict. The only species of credit which the law recognizes, is not that by which merchants are influenced in the choice of securities, the superior opulence or good faith of those who are made responsible on the instrument, but only the number of persons who are legally liable: if a genuine bill is circulated with six indorsements, of which three are fictitious, that is clearly a forgery, because it purports that other persons are legally liable, who are not so; but this alteration does not increase the number of persons who may be sued on this instrument. The increase of credit obtained from any other circumstances represented as attending the bill, cannot make the alteration a forgery.

Cur. adv. vult.

Sentence of death was afterwards passed on the prisoner.

(*a*) At the *Sussex Lent* assizes 1810, Lord *Ellenborough* C. J. delivered the opinion of the Court.

The Judges held that the act done by the prisoner was a false making, in a circumstance material to the value of the note, and its facility of transfer, by making it payable at a solvent, instead of an insolvent house. (*Ex relatione Mri. Walford.*)

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Nov. 11.

The KING v. HOLDEN, LAW, SMITH, HARTLEY, DRAPER, and CUDWORTH.

In an indictment for feloniously disposing and putting away counterfeit bank notes, it is not necessary to aver *to whom* the note was so disposed of.

The intent to defraud the bank constitutes the offence, and it is not done away by the circumstance, that the notes were furnished by the prisoner in consequence of an application made by an agent employed thereto by the bank, and that they were delivered to him as forged notes, for the purpose of being disposed of by that agent.

THESE Defendants were severally indicted, tried, and convicted before *Chambre* J. at the *Lancaster* summer assizes 1809, for knowingly disposing of forged bank notes. The form of the indictment was the same in each case. The first and third counts in each, (upon which no evidence was given,) charged actual forgery. The second count in each charged, that the prisoner, on the 15th day &c. with force and arms, at *R.* in the county of *Lancaster*, feloniously did dispose of and put away a certain false, forged, and counterfeit bank note, the tenor of which was as followeth, (an exact copy set out,) with intent to defraud the Governor and Company of the Bank of *England*, he (the prisoner) at the time of his so disposing of and putting away the same forged and counterfeit bank note, then and there, well knowing such last-mentioned note to be forged and counterfeited, against the form of the statute, &c. &c. The fourth count differed from the second, only in describing the forged instrument to be a "promissory note for the payment of money," instead of calling it a bank note. In the course of the evidence it appeared that the notes in question were disposed of to *John Shaw* and *James Whitehead*, the principal witnesses against the prisoners, who, in consequence of a great number of forged bank notes having been circulated in the neighbourhood, were employed by the magistrates, with the approbation of the agents for the bank, to detect those who were suspected to be utterers. The prisoners did not pay the notes to *Shaw* and *Whitehead* as genuine; but those persons, for the purpose of detection, applied to the

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the prisoners, as supposed dealers in forged bank notes, to purchase them; and the prisoners accordingly procured them, and sold them as forged notes; so that *Shaw* and *Whitehead* were not deceived or defrauded in any of the instances; nor were any of the prisoners the first movers in the transaction they had with the witnesses; neither did it appear by any direct evidence, that either of the prisoners, when he was first applied to, had any of the notes in his actual possession; but they respectively produced them at meetings which took place subsequent to such first application. The rest of the evidence was full and satisfactory, and the four first named prisoners were convicted without any objection being taken to the form of the indictment, or to the insufficiency of the act of disposal to constitute the offence created by the statute; but upon the trial of *Draper*, it was objected on his behalf, 1st, that the indictment was insufficient, as being too general, neither stating in what manner, or to whom, the notes were disposed of and put away. 2dly, That the disposition of the notes established by the evidence was insufficient, inasmuch as the prisoners were solicited to commit the act proved against them, by the bank themselves, by means of their agents: on this point the prisoner's counsel referred to the case of *Mac Daniel and Others*, 10 *State Trials*, 432, &c. *Chambrè* J. over-ruled the objections. The convicts all received sentence; but the learned judge thought it proper to respite execution in order to take the opinion of the judges upon the objections.

The case was argued in the last *Michaelmas* term, before the twelve judges in the *Exchequer* Chamber, by *Yates*, for the prisoners. He contended that no person could so put himself in the place of a judge, that he could be innocent in procuring the repetition of a crime for the purpose of punishing it, and that a material distinc-

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tion was to be drawn from the cases of *Mac Daniel, Foster*, 121. *Norden's case, Foster*, 129. and *Egginton and Others*, 2 *Bos. & Pull.* 508. S. C. 2 *East, P. C.* 666. taken together, namely, that when the offence originates with the person supposed to be prejudiced by it, the property cannot be said to be taken *invito domino*. [Lord *Ellenborough* and *Mansfield*, Chief Justices, desired him to shew how he could so apply this principle, as to make the assent or dissent of the disponee at all essential to this offence, which is defined by the statute to be the disposing of and putting away forged bank notes.] In like manner it is no offence to commit a cheat or use a false pretence by the procurement of the person to be affected thereby. In *Ward*'s case, 2 *Str.* 747. and 2 *Ld. Ray.* 1461. it was held that a forgery must be of such an instrument, that if it had been true, it would have been to the damage of some one; but this act could not be to the damage of the bank, whether they are considered as agents for the crown, as an independent corporation, or as individuals; for they knew that the notes were forged, and therefore could not be deceived thereby: all the offences created by the statutes on this subject, of 2 *G.* 2. *c.* 25. 7 *G.* 2. *c.* 22. 15 *G.* 2. *c.* 13. *s.* 11. 18 *G.* 3. *c.* 18. and 45 *G.* 3. *c.* 89. are made offences only with reference to the party who is to be defrauded thereby, and in all of them the intent to defraud must be considered. Since *Shaw* and *Whitehead* were employed by the bank, the bank must be considered as identified with them, and having entirely the same privity. Consequently, there could be no intent to defraud the bank, unless there was an intent to defraud *Shaw* and *Whitehead*; and it is quite clear on the evidence, that neither was there any attempt to defraud them, nor was it possible that they could be defrauded thereby, because the notes were not paid to them as genuine, but as false notes. A master is *quasi* crimi-

nally

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nally answerable for the acts of his servants. *Rex* v. *Bower*, *Cowp.* 323.

Secondly, The indictment is insufficient; for since the immense issues which have taken place of small bank notes, the setting forth the tenor of the note conveys no information at all to the prisoner of the transaction on which he is indicted: the same note may pass many times through his hands; and as the day, year, and place have long been considered immaterial, it is necessary that the indictment should point out the name of the person to whom the forged note was disposed: In *Jones*'s case, *Doug.* 302. although the special verdict found to whom the note was put away, yet it could not cure the defect of the indictment, which omitted to state that circumstance. [Lord *Ellenborough* C. J. observed, that the present indictment contained every word which the statute uses for constituting the offence.] There are many cases where that is insufficient. Thus, in an indictment for obtaining money under false pretences, the false pretences must be set out, though the statute does not require it. On the stat. 9 *G.* 1. *c.* 22. the black act, an indictment for setting fire to a house must aver it to be done wilfully and maliciously, because those words are essential to constitute arson; yet those words are not in the statute. So in an indictment for sending a threatening letter, the threatening letter must be set out. So an indictment for stealing goods from a furnished lodging, must state by whom the lodging is let. *Rex* v. *Ann Pope*, 1 *Leach*, 377. So on the statute of 8 & 9 *W.* & *M.* an indictment for putting off counterfeit coin "to divers persons," was held ill, where the person was known, though the statute says, "to any person or persons." 1 *East*, *P. C.* 180. [Lord *Ellenborough* C. J. and *Lawrence* J. observed, that this statute did not contain the words to any person or persons, but to put off, with intent to defraud the Governor and Company of the Bank of *England*.]

Lamb

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Lamb, for the prosecution. As to the last objection, the precedent of this indictment has been in use more than forty years; it was settled by the ablest lawyers of the day, and numbers have suffered upon indictments thus framed: it states the offence in all the words used by the statute. The name of the person to whom the note was put away, could not convey more full intelligence of the offence, than the tenor of the note exactly set forth: the analogy drawn from other statutes is not applicable; nevertheless it may be observed, that if the tenor of the threatening letter, and the false token be set out, it suffices. The indictment for putting off counterfeit guineas to divers persons unknown, comprehended several felonies under one count; but although *Holt* C. J. who tried the prisoner, said the names should be set out, she was nevertheless convicted on that indictment. The old entries in *Tremain* and other books, do not state to whom the forged note was uttered or published, but only that it was uttered or published with intent to defraud. The offence does not consist in the actual defrauding, but in the intent to defraud; and although the prisoner did not intend to defraud the witnesses, and to pass the note to them as genuine, it was his intent to defraud the bank, and he sold the notes to the witnesses at an inferior price, for the purpose of their uttering them to defraud the bank. Of the witnesses' agency for the bank there was no proof; but still, if there had been, it was not therefore, as is said, impossible that the bank should be thereby defrauded; for their agents might have practised a fraud, and passed the notes instead of keeping them. Many persons have been convicted of uttering notes, bought for the purpose of convicting them. *Rex* v. *Palmer*, 1 *New Rep.* 96. it was held a complete offence to deliver a forged note to another, to the intent that that other should utter it as true. The bank did not employ the witnesses for the purpose of obtaining these specific notes,

notes, but generally for the detecting all counterfeit notes.

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Yates in reply. If the treachery of the servants of the bank would make the offence of the utterers complete, it would be putting the lives of persons in the power of the bank and their agents. The putting off base money is an act of treason against the state, and not, like forgery, an offence against individuals only, which accounts for the case before Lord *Holt*. As to *Palmer*'s case, the only question was, whether he was accessary or principal: if he adopted the act of *Hudson*, he was the utterer: but it never could be alleged or proved that he uttered the note with intent to defraud *Hudson*.

Cur. adv. vult.

The Judges did not afterwards pronounce any opinion, but the prisoners were executed according to their sentence.

The KING v. STOCK, *alias* STOCKTON, and EDWARDS, *alias* DUDLEY.

Nov. 11.

The servant of three partners in trade had weekly wages, and three rooms assigned to him for lodging, over the bank and brewery-office of the partners, with which it communicated by a trap-door, and a ladder: a burglary being committed in the banking-room, it was held that it was well laid to be in the dwelling-house of the three partners.

THESE two prisoners were tried and convicted before *Chambre* J. at the summer assizes, 1809, at *Carlisle*, upon an indictment for burglary. The burglary was charged to have been committed in the dwelling-house of *William Moore*, *Thomas Harrison* and *Hamilton*, at *Whitehaven*. There was full proof of the prisoners breaking and entering in the night, and stealing money, bills,

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bills, and notes to the amount of between nine and ten thousand pounds. Sentence of death was passed upon the prisoners; but the learned judge not being satisfied that the house could, under the circumstances of the case, be considered as the dwelling-house of *Moore*, *Harrison*, and *Hamilton*, the prosecutors, respited the execution. The evidence was, that the prosecutors were partners in their business of bankers, which business was transacted in the lower rooms only of the house in question, of the whole of which house they were the owners. They were also partners in a brewery concern, which they carried on in some adjoining premises. The lower rooms of the house were three in number, to which there was but one entrance from without, which was by a door opening to the street, being the door broken open to commit the felony. It opened into one of the three rooms, and in that room the clerk's business relating to the brewery was transacted. That room communicated by a door-way with an inner room, where the banking business was done, and where the cash, notes, and other valuables were deposited, and locked up at night in an iron safe. That room communicated in the same manner with a further room, which was the private room of the partners. There were two locks to the outer door, one of them a large one, the other a smaller: one of the clerks had the custody of the key of the larger one, and two other clerks had each a key of the smaller one; no person slept in any of these rooms; but when the outer door was locked up at nights, on leaving the offices, the clerk who kept the large key left it in the care of the person who inhabited the upper rooms of the house, from whom it was received on returning to the offices in the morning. The upper rooms were inhabited by *John Stevenson*, who was servant to the prosecutors in their brewery business, as their cooper, at weekly wages, with firing and lodging for himself and his family. The

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contract as to the lodging was not, in general terms, that he should be provided with lodging, but that he should have the particular rooms, which he did inhabit, for the lodging of him and his family; and to that part of the house there is a separate entrance from without. His employers kept there some papers of no consequence. There was no communication between the upper rooms and the lower ones where the offices were, except that there was a trap-door in the floor of one of the upper rooms, and a ladder whereby to go down into the lower part. Since the robbery it had been constantly used in order to bolt the street-door of the offices in the inside for better security; but none of the witnesses knew of its having ever been used for any purpose previous to the robbery, although it might have been so used at any time, the trap-door having never been kept locked or fastened. There were nine windows in the lower rooms, and only six in the upper rooms; the six were assessed in the name of *Stevenson*, but his employers paid the duty. The rooms below were not charged with any window-tax, the assessors not considering them as inhabited. The questions were, 1st, Whether this inhabitancy could be considered as the inhabitancy of the prosecutors by their servant *Stevenson*, or whether *Stevenson* by the contract became tenant, and the upper part of the house was his dwelling-house, and not that of the prosecutors. 2d, If these premises were the dwelling-house of the prosecutors, the further question arose, whether there was such a severance of the lower part, as to prevent its being included as part of their dwelling-house.

The case was argued in the last *Michaelmas* term in the Exchequer Chamber, before the twelve judges, by *Raine* for the prisoner, who contended, that the house could be the dwelling of the prosecutors only in one of two ways, by their inhabiting it either by themselves, which

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which it was clear they did not, or by their servants; and he contended that they did not occupy it by their servant; because the evidence was, that *Stevenson* had half a guinea a week wages and this lodging; and it was in proof that the usual wages of a person in his situation were 14*s*. a week without lodging; he might therefore reasonably be considered as renting these rooms at the rent of 3*s*. 6*d*. *per* week. The assessors too had assessed him for the window tax. Besides, *Stevenson* was clerk to the brewers, and not to the bankers.

Lord Ellenborough C. J. Could *Stevenson* have maintained trespass against his employers for entering these rooms? Or if a man assigns to his coachman the rooms over his stable, does he thereby make him a tenant? Whether the assessors formed a right or a wrong judgment, can make no difference: nor is it material to which trade *Stevenson* was a servant, for the property in both partnerships belonged to the same persons. As to the severance, the key of the trap-door was left with *Stevenson*, and the door was never fastened; and it can make no difference whether the communication between the rooms was through a trap-door, or by a common staircase.

Mansfield C. J. Many servants have houses given them to live in, as porters at park-gates: if a master turns away his servant, does it follow that he cannot evict him till the end of the year? Could not the prosecutors have turned out this man when they would?

Cur. adv. vult.

No judgment was ever publicly given, but the prisoners were afterwards executed.

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In an action on a warranty of a horse, the Plaintiff must positively prove that the horse was unsound.

THIS was an action upon the warranty of a horse. The horse died a few days after the sale; and on dissection it was found that the lungs were greatly inflamed and adhered to the ribs, and the *pericardium* was an hundred fold thicker than in a state of health. Evidence was given that the horse had been apparently in health and high condition down to the time of the sale and delivery; and several veterinary practitioners stated that the disorder was of so rapid a nature, that inflammation of the lungs was sometimes known to begin, and proceed to mortification within the short space of three days; and that it was impossible that this complaint could have existed at the time of the sale, for if it had, it would certainly have been manifested by a thickness of breathing. The Plaintiff called a farrier, who imputed the sleekness and facility with which the skin of the horse at the time of the sale moved over the muscles, to the water of a dropsy on the chest having gotten between the external skin and the flesh, and on his testimony, the jury, at the *Guildhall* sittings after last *Michaelmas* term, before *Mansfield* C. J., found a verdict for the Plaintiff.

Vaughan Serjt. in *Easter* term obtained a rule *nisi* to set aside the verdict, and *Best* Serjt. with him now endeavoured to support it; he said the evidence was doubtful, and the jury, who were the proper judges of that doubt, had decided it.

But *The Court* were clear that the Plaintiff ought to have been nonsuited at the trial. On the warranty of a horse, it is not sufficient for the Plaintiff to give such evi-

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dence as to induce a suspicion that the horse was unsound: if he only throws the soundness into doubt, he is not entitled to recover: the Plaintiff must positively prove that the horse was unsound at the time of the sale.

Rule absolute.

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Those ports of *St. Domingo* which are under the dominion of *Christophe* and the negroes engaged in hostility with *France*, are neutral ports; and no licence is necessary to legalize a trade with them.

If a vessel be chartered to any ports of an island, part of which is hostile, and part neutral, and the freighter covenants to procure a licence; if the ship trades to a neutral port of the island, it is no breach of the covenant that the freighter has procured a licence which would not authorize the like trade to an hostile port.

The master of a ship detained as prize, and libelled in the Prize Court at *Jamaica*, gave bills of lading of the cargo to one who became bail for the ship and cargo there: held that the master had no authority to contract that the cargo should be sold in *London*, and the proceeds remitted back to *Jamaica*, the owners being ready to give a sufficient security to indemnify the bail in *London*.

THIS was an action of covenant upon a charter-party. The declaration stated in substance, that the Plaintiff covenanted, that the master of his vessel, the *Ben Lomond*, should receive on board, freight-free, a cargo at *Portsmouth*, and proceed to any port or ports in the island of *St. Domingo*, and that on her arrival there, after delivery of her cargo to the agents of the freighters, she should take on board a full and complete cargo of coffee, cotton, indigo, and other lawful goods, and proceed to *London*, and there make a right and true delivery of the cargo unto the *freighters, their executors, administrators, or assigns*, agreeably to bills of lading. And it was agreed, that 65 running days should be allowed for loading at *Portsmouth*, and for unloading again at *St. Domingo*. In consideration whereof, the Defendants covenanted, that they would at their own costs undertake to procure a licence for the said ship, and would not only put on board a cargo at *Portsmouth* for *St. Domingo*, and, on the ship's

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arrival at *St. Domingo*, put on board a full cargo of produce for *London*, at or within the running days, and days of demurrage therein mentioned, but also would pay the Plaintiff freight for the cargo at the rates therein mentioned, together with five *per cent.* to the captain on the amount of the freight, in lieu of primage, pierage, and port-charges: 400*l.* on account of the freight to be paid immediately, and the remainder at the end of two months after the ship's arrival at *London*, and having reported at the custom-house, and upon a right and true delivery of her cargo. And it was provided, that the Defendants might detain the vessel on demurrage 20 days in the whole, above the 65 running days before mentioned, at the rate of eight guineas a day. The Plaintiff then averred, that he took on board a cargo at *Portsmouth*, and proceeded to *St. Domingo*, and after delivering the outward cargo, received there from the Defendants' agents such cargo of coffee, cotton, &c. as they thought fit to send on board; that the vessel sailed for *London*, and arrived, and *there delivered the said cargo.* He then averred breaches, 1. That the Defendants, their agents, &c. did not put on board at *St. Domingo* a complete cargo of produce for *London*, but only a partial and incomplete cargo, insufficient to load the ship by 80 tons, by reason whereof the Plaintiff lost freight to the amount of 720*l.* in respect of that quantity of produce, and five *per cent.* thereon for primage, &c. The second breach assigned was, upon the Defendants' refusal to pay demurrage for 20 running days above the 65 running days. The third breach was, that the Defendants would not load the ship within the 65 running days and 20 days demurrage, but detained the vessel after the expiration thereof for the further space of 6 days, without making any compensation for the same. The fourth was, that the Defendants did not procure a *proper and sufficient licence for the vessel for the occasion*, by reason whereof the vessel.

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vessel, and cargo put on board at *St. Domingo*, before her arrival at *London*, for want of such licence having been procured, were seized and detained by certain officers and persons to the Plaintiff unknown, and conducted to the island of *Jamaica*, and detained on and about the occasion aforesaid 60 days; and also that by reason of the premises the Plaintiff was put to great expence in the subsistence and expences of the master and crew at *Jamaica*, and in and about the surveying and examining the vessel and cargo, and defending the same against confiscation, and in and about procuring and giving bail and security on that occasion. 5thly, That although the Plaintiff, on the ship's arrival at *London*, made a right delivery of 6 tons of coffee, which had been loaded at *St. Domingo*, and although two months had elapsed since the ship had arrived at *London*, and been reported at the custom-house there, and since the delivery, the Defendant had not paid the freight. The Defendants pleaded to the first breach, that they did load a full cargo at *St. Domingo*; to the second and fifth, that there was nothing in arrear; to the third, that they did not detain the vessel at *St. Domingo* after the 65 days, and 20 days; to the fourth, that they did procure a proper and sufficient licence for the ship on that occasion; and to the first and fifth they also pleaded, that the Plaintiff did not, on the ship's arrival at *London*, make a right and true delivery of the cargo to the freighters or their assigns, agreeably to bills of lading, according to the effect of the charter-party. They also pleaded a set-off. The Plaintiff joined in the issues tendered on all the breaches, and demurred to the plea last pleaded to the first and fifth breach, and tendered issue upon the set-off. Upon the demurrer, judgment was given for the Plaintiff.

Upon the trial of this cause at *Guildhall*, at the sittings after last *Michaelmas* term, before *Mansfield* C. J. it appeared

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peared that the Defendant had procured a licence, which recited, that the Defendants were desirous of obtaining the royal licence and protection for the *British* ship "*Ben Lomond*," *W. Barr*, master, which they intended to load at *Portsmouth* with a cargo of *British* manufactures and *East India* produce, to convey and export the same to the island of *St. Domingo*, and also of obtaining the royal licence and protection for the importation (*in return for the cargo so to be exported*) of specie, bullion, coffee, &c. or any other articles the growth or produce of the said island; and his majesty thereby directed, that the property of the Defendant *Greaves*, and other *British* merchants, so to be exported to any ports or places in *St. Domingo*, which should not be under the immediate dominion of any of his majesty's enemies, and *also the returns of the said cargo, consisting of articles of the growth and produce of the said island* (except copper), to be brought back in the same ship, direct to some port of the United Kingdom, should not be liable to condemnation as prize: provided, that if the said property should be seized or detained, either on the outward or homeward-bound voyage, as prize to any of his majesty's ships of war or privateers, and brought to adjudication in any of the courts of Admiralty or Vice-admiralty, it should be forthwith released upon a claim being exhibited, and sufficient bail being given to answer the adjudication thereof; but that it should lie upon the Defendant, or his agents, to make due proof of the circumstances therein stated, and that every thing was had and done according to the true intent and meaning of that licence. The vessel received on board at *Portsmouth* a cargo, chiefly of coffee-bagging, of no great value, and sailed; and on her arrival at *Cape Francois*, which was then under the dominion of *Christophe*, the master received from the Defendant's agents there instructions to proceed to *Gonaives*, another port in the same island, and

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under the same dominion, where he discharged his outward cargo, and received on board a valuable cargo of coffee and cotton, the produce of the island, in separate parcels, respectively consigned to the Defendants and other persons, for which he signed several bills of lading, deliverable to the respective consignees. On the 29th of *March* 1808, the ship sailed from *Gonaives* on her homeward voyage, and on the 30th was detained by the *Dædalus* frigate, Captain *Warren*, who conceiving on inspection of the papers, that the greater part of the cargo on board had not been shipped in return for the outward cargo, within the scope of the licence, sent the ship and cargo into *Kingston* in *Jamaica*. Upon her arrival there on the 11th of *April* following, he restored to the master 73 bags of coffee consigned to the Defendants, which appeared to be purchased with the produce of goods directly exported from *London*, and libelled the remainder of the cargo as prize, in the court of Vice-admiralty at *Jamaica*. The master in order to procure the liberation of the residue of the cargo, without any other authority than that which he possessed as captain, but thinking it the best thing for the interest of his employers, agreed with Messrs. *Dicks* and Co., merchants, resident at *Kingston*, that they should give bail for the ship upon terms of their suggestion, which he specified in a letter addressed to them, wherein he stated, "that it would be of great advantage to all concerned, "that bail should be given for the ship, so as to allow "her to proceed in the fleet; and that if they would "come forward on behalf of the concern, he would "propose to offer them reimbursement in *England* for "the amount they should enter into bond for, and all "charges, and to be secured to them as followed, viz. "to petition the judge that the cargo might be released, "and delivered over to them; to give them the bill of "lading for the 73 bags of coffee not libelled, deliver-

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" able to their order, *to secure all costs and charges;* to " give them bills of lading for the several other parcels " of goods of which the cargo consisted, to secure the " payment of their several bills drawn at sight upon the " respective consignees of the several parts of the car- " go," (for sums specified in the letter, and together amounting to 7042*l.* 11*s.* being the estimated value of the respective consignments.) He added, " that as the " ship would lose her freight, provided they did not " give the security required, and it thereby became a " great object to her owners, as well as to the owners " of her cargo, that it should be carried into effect, he " thereby agreed, that in case the persons on whom the " bills were drawn should not pay them, and the net " proceeds of the produce delivered to Messrs. *Taylor* " and *Hughan*, the agents of Messrs. *Dicks* and Co. " should fall short of their amount, in such case the " owners of the ship should only be entitled to one " penny *per* pound for cotton, and 7*s.* 6*d.* for coffee; " and it was understood and agreed, that, should the " person on whom the bills were drawn refuse to se- " cure the payment to the satisfaction of *Taylor* and " *Hughan*, in *London*, then they should be at liberty to " insure the amount of such part as was so refused, and " charge the expence to the sales; but provided the " bills of exchange were all duly paid and secured, then " the freight would of course be settled, according to " the former bills of lading." Messrs. *Dicks* and Co. having given bail conformably to this proposal, the ship and cargo were liberated; whereupon the master signed fresh bills of lading for the several parcels of goods, therein describing the goods as " shipped by *Dicks* and " Co., and to be delivered at the port of *London*, to the " order of the shippers or their assigns; freight for the " said goods as *per* agreement, with primage and ave- " rage accustomed." He then proceeded with the ship

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and cargo for *London*, and arrived. The Court of Vice-admiralty in *Jamaica* condemned the goods as enemy's property, whereupon *Dicks* and Co. paid the captors the agreed value of them, and costs, and drew bills on the several proprietors of the cargo, in order to reimburse themselves that amount. The Plaintiffs offered to the Defendants to deliver them the 73 bags of coffee not libelled, upon payment of the costs and charges which *Dicks* and Co. had incurred in the suit instituted in *Jamaica*. *Taylor* and *Hughan* eventually delivered the proceeds of these 73 bags of coffee, which were sold by consent, the market being then favourable; but insisted on the Defendants' paying the sum of 489*l.* for the costs of *Dicks* and Co., which they paid under a protest against the legality of the demand; and thereupon *Taylor* and *Hughan* delivered the coffee. The ports of *Cape François* and *Gonaives* were not, at the time of this adventure, in the power of the enemies of *Great Britain*. Upon appeal brought in *England*, the sentence of the Vice-admiralty Court in *Jamaica* was reversed, upon payment by the owners of the captors' costs. The jury found a verdict for the Plaintiffs for the damages in the declaration, subject to the opinion of the Court upon the following questions: 1. Whether the licence which the Defendants had procured was a sufficient licence for the protection of the whole cargo, and such an one as it was incumbent on the Defendants to furnish; and supposing it were not, it was contended, that the Defendant was liable to pay demurrage for the time during which the ship was detained by the *Dædalus*. 2dly, Whether the delivery of the proceeds of the 73 bags of coffee, shackled as it was with the compulsory payment of a sum of money, to reimburse *Dicks* and Co. for the costs they had disbursed in *Jamaica*, was a sufficient delivery within the meaning of the charter-party. It was referred to arbitration, to ascertain the sums due to the

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Plaintiff for dead freight, the demurrage accrued before the ship *Benlomond* sailed from *St. Domingo*, the demurrage and captain's expences occasioned by the detention by the ship *Dædalus*, and the amount of freight due for the 73 bags of coffee; it being admitted, that 489*l.* had been paid by the Defendants to the Plaintiffs on account, the arbitrator was to decide, after the judgment of the Court should have been given on the points reserved, whether that sum would cover the whole amount of such of the Plaintiff's claims for which the Court should deem him entitled to recover; if it would, a nonsuit was to be entered.

Accordingly *Lens*, Serjt. in *Hilary* term, having obtained a rule *nisi* to set aside the verdict and enter a nonsuit,

Shepherd and *Best* Serjts. in this term shewed cause: they contended, that the master was empowered by the necessity of the case, to pledge the 73 bags of coffee as a security for the costs. They were the only security he could offer, the ship and the residue of the cargo being the subject of litigation; and if he had not done it, the Defendants would have had to appeal against the decree of the Prize Court of *Jamaica*, but the sentence would now have stood unreversed. If the vessel had been detained for want of security, this coffee, although liberated, would have been of no value, not being saleable in *Jamaica*; and the interest of the consignees therefore required that it should be pledged for the costs, for the purpose of enabling the ship to bring it home. If the Defendants disputed the lien thus created on this part of the cargo, they ought not to have accepted the proceeds of the sale: by that acceptance they admitted the lien. If the coffee had been delivered in specie to the Defendants, they must have paid freight for it. Having had the

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benefit of selling it in a favourable market, they cannot now say that they are not liable to pay the freight. 2. The Defendants did not perform their covenant, in not having obtained a proper licence and safe conduct for the ship. The intention of government in granting these licences is to obtain a market for *British* produce, or for *East India* goods, which we are equally interested in selling; and they therefore authorize a vessel to bring back from *St. Domingo*, only that cargo which the sale of the *British* commodity exported thither will enable the merchant to purchase, and no more. A licence, they said, was never granted for a vessel to go out in ballast in order to bring home a cargo, except in particular cases, when the produce of the foreign country is particularly wanted in *England*, as wheat or brandy from *France* may be. If the exportation of a very small value in *British* goods exported would legalize the importation of a very large value of foreign produce, this would differ little from the case of a ship sent out in ballast. The language of the licence was not in this case, as it sometimes is, for the *return cargo of the said ship*, but for the *returns of the said cargo*, and there is an express proviso that the licence shall not protect any other property on board the said ship, except the property of the said *J. P. Greaves*, and other *British* merchants, *being of the description thereinbefore specified*, that is, being the *returns of the said cargo*. The circumstance of costs being allowed by the Court of Appeal to the captors, shews that the ship was improperly navigated, or that there was something irregular in the conduct of the captured; otherwise it is more usual to give costs to the captured party; and if it is said that this sentence was given by way of compromise, then the sentence of condemnation stands unreversed. The intention of the contracting parties was, that the Defendants should, at all events, obtain such a licence

licence as should be free from all cavil, and question of its legality; and the having a licence not adapted to the adventure, served to mislead the captors, and induce the detention.

Lens and *Vaughan*, Serjts. *contrà*. It has been twice adjudged that no licence is necessary for trading to the dominions of *Christophe* in *St. Domingo*; but that they are like any other neutral or allied port: first in the case of the *Manilla*, 1 *Edwards' Rep.* 1.; and again by the Master of the Rolls, in the case of the *Phœnix frigate*; and the issue joined on the validity of the licence obtained, is wholly immaterial to the merits of the cause. It was clearly agreed on all hands in the Court of Appeal, that the judgment of the Prize Court in *Jamaica* could not be supported; but the Plaintiffs, dreading the expences of further proceeding, accepted a proposition made by the captors, of permitting the judgment to be reversed, the owners still paying the 489*l.* costs before decreed. It therefore is clear that the judgment cannot be for the captors. The construction of the covenant to obtain a licence is merely this, that, if any licence is necessary, the Defendants will obtain it. But supposing that the Defendants are bound by this issue to prove that they have obtained a sufficient licence, though none was necessary, yet the terms of this licence have been complied with. A cargo of *British* manufacture was carried out, and a cargo of the produce of the island was brought home, which is all that the licence requires. It never was in contemplation that the outward cargo should be the precise measure of the homeward cargo: the owners were desirous of a licence for the importation of a cargo in return for the cargo to be exported, that is, in the ship's return; but the licence does not say that nothing shall be a fair return for the outward cargo, except those goods which are actually substituted

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stituted for it. If it had been intended to require that the cargoes should be commensurate, the licence would have been differently worded, and would have so expressed it, as it has been usual to do, when such was the intention; for, until of late, the licences contained a proviso "that the return cargo should be purchased out of the proceeds of the outward cargo, and that the amount of the return cargo should not exceed the net mercantile profit of the goods exported more than 60 *per cent.*" But this arrangement was found productive of so much inconvenience on account of the daily detention of vessels by our cruizers, that an Order of Council of the 6th of *April* 1808, directed that clause to be omitted in future. The interpretation contended for would lead to this inconvenience, that if an export cargo of value apparently adequate to purchase a full homeward cargo, should be damaged or depreciated during the voyage, the ship must necessarily return with a deficient loading; and many of the articles legalized by this licence, such as indigo and bullion, are articles of the greatest necessity, and for which the government would readily grant a licence for a ship to go out in ballast, though if such had been the case, it would probably have been expressed *in the licence* according to the fact. The second question is, Whether there was a sufficient delivery in this case? The covenant is, to deliver the goods according to the Defendant's bills of lading; and the Plaintiff contends he has performed it, by a delivery agreeable to the bills of lading signed to *Dicks* and Co., and not given under any agreement to which the Defendants were privy, but wholly without their authority. First, the master had no authority to pledge the property; but the Defendants wave that objection, and considering the lien as fair and reasonable, are willing to submit to it as a species of mortgage on the goods, and offer security to any amount; but the Plaintiff does not even deliver the goods

goods on the terms of the master's agreement: for that contract must be construed to mean that the bills of lading should become absolute, only in case the persons on whom the bills of exchange are drawn, should refuse to secure the payment to the satisfaction of Messrs. *Dicks'* friends in *London*. The bills of exchange, it is true, are not accepted, but the Defendants offer to give any security that can be required; and *Taylor* and *Hughan* do not object to the nature or amount of the security proposed, but they reject all security whatever, and insist upon having the entire proceeds of the cargo remitted to *Jamaica* in specie, in consequence of a subsequent letter written them by *Dicks* and Co., and forming no part of the contract made by the master, for the purpose that *Dicks* and Co. may be enabled to charge commission upon the consignments sent hither, as an unsuccessful commercial adventure of theirs, and may therefore again send the amount in produce, in another season, and charge another commission thereon; which is a most unreasonable condition to impose.

MANSFIELD C. J. This is a case on a charter-party: the question arises on a licence; and the issues joined are very extraordinary. 1. This is not a charter-party to go to any particular port or ports in *St. Domingo*, but generally to proceed to any port or ports in *St. Domingo*, without any distinction of such port or ports as were under the government of *France*, and in a state of hostility, and such as were not; there is a covenant that the Defendant shall procure a licence, not indeed saying a sufficient licence, but that is rightly construed to mean a sufficient licence, *i. e.* sufficient for such port or ports as the ship should go to. Then the charter-party contains a covenant to deliver to the freighters agreeably to bills of lading. With respect to the licence, the declaration varies from the charter-party; the Plaintiff introduces into the

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the declaration an averment, that the Defendant did not procure a sufficient licence, and he does not allege that he delivered the goods according to the terms of the charter-party on the return voyage, but that he delivered the goods at *London:* it looks as if the drawer of that declaration had thought there were doubts whether the delivery was sufficient. As to the licence, the plea is, that the Defendant procured a sufficient licence; and as to the delivery, that the Plaintiff did not truly deliver the cargo. Then issue is joined in these terms: and two questions have arisen, 1. as to the licence, Whether a cargo, being purchased with the proceeds of the outward cargo to a very trifling extent only, or not at all, is within the licence? The issue is intended to try that matter; but that is not the question that must govern this case. To some ports of *St. Domingo*, which are friendly, a licence is not necessary, To others, which are hostile, a licence was necessary; and if the ship had gone to an hostile port, a licence would have been necessary; to a neutral port a licence was not necessary. Then the ship having procured a licence sufficient for an hostile port, for which alone it was necessary, and having gone not to an hostile, but to a neutral port, in which a licence was not necessary, how can it be said she had not a sufficient licence? The case has not occurred, in which a licence was necessary. The Plaintiff then can recover no damages upon the breach assigned for the want of a licence. There has been much argument on the meaning of a return cargo; and to be sure the words would mean nothing, if they would cover any cargo, not being a cargo bought with the produce of the goods sent out from this country: but it is not necessary now to decide that question; for the covenant to procure a licence cannot apply to the case in which no licence is necessary. Nothing can arise from the accident of the captain of the *Dædalus* having against law detained this

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ship; if he did so, the party might sue him for damages in the Court of Admiralty, or in the Prize Courts, which sometimes give damages. From some cause, which does not appear, the Court has in this instance thought fit to give the captors costs, but we cannot on that account distinguish it from any other case, in which the default has happened by the wrongful attack or detention of others: therefore, on the question of the licence, we think nothing can be recovered on this covenant. 2. The person who drew the declaration seems to have been aware that this was a very particular sort of delivery, for he has not averred it was delivered to the Defendant; but it has been argued that this does amount to a constructive delivery to the Defendant. The ship being carried into *Jamaica*, and libelled in the Admiralty Court, *Dicks* and Co. become bail: the master offers them a very large and ample security, to pledge the whole of the cargo. I do not go into the question, whether the captain had a right to pledge these 73 bags, being not libelled: he pledges, however, the whole of the property. He adds a very singular condition, that the whole of the proceeds are to be remitted to *Jamaica*, which must be again remitted hither, probably in goods; upon all which remittances, both ways, commissions are due. The goods come hither to *Taylor* and *Hughan*, agents of *Dicks* and Co., the claim proceeds in the Admiralty Court here, and the libel is dismissed, allowing the captor's costs: the Plaintiff applies to *Taylor* and Co. for the coffee; they say no; we will not deliver it, because we are bound to remit the whole proceeds to *Jamaica:* under these circumstances, the Plaintiff claims freight; now as the goods come hither under bills of lading, we must suppose they contain the words, "upon payment of freight," which all bills of lading have. If so, *Taylor* and Co. ought not to have required the goods, nor ought the captain to have delivered them, but on payment of the freight; and when he did

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deliver them without payment of the freight, he must have acted contrary to his agreement with *Dicks* and Co.; for they took on themselves that their agents should pay freight. When? On delivery to them. What a condition then the freighter was put into! For these persons were to have, not only the disposal and sale of these goods, but the disposal of the proceeds, and to send them to *Jamaica;* and the Plaintiff is to wait for the freight till the proceeds come back, and until all the claims of *Dicks* and Co., and their agents, are discharged, and to trust to the surplus, if any. But independently of the ground of the agreement contained in the bill of lading, by which the captain agreed to look to *Taylor* for freight, had the captain such a power as enabled him to dispose of the goods in the manner which he has done? In cases of necessity, as in this of giving bail, the captain may give a pledge, hypothecate; but it is contrary to the very idea of a pledge, that the goods, instead of being redeemed, are to be immediately sold, and the proceeds sent to *Jamaica.* It seems to me, therefore, that this was not a sufficient delivery; consequently the Plaintiff is not entitled to recover any thing in respect of the detention of the ship in *Jamaica*, and cannot maintain an action for the freight of these goods from *Jamaica* to *London.* I have said nothing on the liability of the captain: possibly he might have been told he would be liable to trover, if he had not delivered these goods. It was the captain's duty to deliver up the goods immediately on the ship's arrival; it cannot be said in any sense that the captain delivered these goods to the freighter. Although the persons to whom he delivered them, being perhaps afterwards frightened, gave up the goods, it was not till after many months, and it may be that the freighter may have sustained great loss of the market, or other great inconvenience, by the detention. If *Taylor* and *Hughan* did not pay the captain the freight, he, although he has parted with

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with the possession of the goods, may maintain an action against them. The consequence of this decision will be, that the arbitrator, in settling the account, will give nothing in consequence of the detention of the ship at *Jamaica*, or for the freight of the 73 bags of coffee. Nothing is to be recovered on either of these issues. The rule had better be enlarged until the arbitrator has made up his mind on the other points, and if the Plaintiff is already overpaid, there must be a nonsuit.

HEATH J. expressed himself to be of the same opinion upon both points.

LAWRENCE J. The purpose of the licence was only to protect the ship: the charter-party is, to go to any port in *St. Domingo:* the licence can only be meant to be provided in case she went to an hostile port. You say the licence is not such as would suffice for an hostile port; it may be so: then he has no licence where none is necessary. I cannot think the Plaintiff is entitled to recover the freight: for that, he must do certain things, one of which is the delivering the goods to the Defendants; he does not aver that he has delivered them to the Defendants, and the plea avers that he has not, which is an answer to his claim; and he cannot recover the freight on this charter-party, because he has not performed the requisites. I do not say that he could not bring an action for work and labour, or *assumpsit* for freight; but in this action he cannot recover.

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May 23.

PAUL *v.* CLEAVER.

If a Defendant in custody gives a *cognovit*, it is necessary that an attorney for the Defendant should be present.

An attorney's clerk is not sufficient.

BEST Serjt. had on a former day obtained a rule *nisi* that the *cognovit* which had been given by the Defendant in this case might be delivered up to be cancelled. It appeared on the affidavits that it was given under the following circumstances: The Defendant being arrested, and in custody on mesne process, her attorney called and sent several times to the office of the Plaintiff's attorney, and proposed, on the behalf of the Defendant, that she should give a *cognovit* for the debt and costs, with a stay of execution. The Plaintiff having agreed thereto, a *cognovit* was prepared, and sent to the Defendant's attorney, together with the Defendant's discharge, and he procured the signature of the Defendant to the *cognovit*, and returned it signed to the Plaintiff's attorney; but it appeared by the Defendant's affidavit, that the *cognovit* was signed by her, in presence only of a person named *Lewis*, who witnessed her signature, and that he was not an attorney: he was in fact a clerk of her own attorney.

Shepherd, Serjt. shewed cause against this rule: he said that the rule of Court requiring the presence of an attorney for the Defendant, when a warrant of attorney was given, did not extend to the case of a *cognovit*.

Best, *contrà*, cited *Parkinson* v. *Caines*, 3 *T. R.* 616.

The Court could pretty plainly see that no circumvention had been practised on the Defendant in this case: they were satisfied that she very well knew the effect of a *cognovit*; therefore they would not give her the costs of the

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the application. But they felt it necessary to adhere to the rule of Court; and therefore, as the presence of an attorney's clerk was not sufficient, they made the

Rule absolute.

TWEMLOW v. BROCK.

May 24.

Generally if money be paid into court, and the Plaintiff does not take it out, but proceeds to trial and recovers nothing, he is not entitled to costs up to the time of paying the money into court. But in policy causes, where there is a consolidation rule, and money paid into court, although the cause tried follows the general practice, and the Defendant, if he succeeds, is entitled to the whole costs of that action, yet the Plaintiff is entitled to the entire costs of the short causes up to the time of paying the money into court.

VAUGHAN, Serjt. moved that the prothonotary might review his taxation in this case. This was an action upon a policy. The Defendant had paid into court upon the count for money had and received, the premiums of insurance, under the common rule. The Defendant did not take them out, but went on to trial for a loss upon the policy; and thereupon a verdict was found for the Defendant. The prothonotary had taxed for the Defendant his whole costs up to the final judgment, without any deduction for the costs up to the time when the money was paid into court. *Vaughan* relied on the authorities of *Wilton* v. *Place*, 2 *Bos. & Pull.* 56., and *Muller* v. *Hartshorne*, 3 *Bos. & Pull.* 558., that although the Plaintiff does not take out the money which has been paid into court, he is nevertheless entitled to his costs up to that time; because the payment admits that so far he has a good cause of action.

The Court observed, that in this case the Plaintiff had not proceeded on the count on which the money was paid into court, but for a different cause of action. It is true that if the Plaintiff had taken out that money, he would have been entitled to the costs on the whole declaration, up to the period when it was paid in; but here he proceeds on a count on which no money was paid in. The general rule in this Court, which regulates costs in the

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case where money is paid into court, is the same as in the Court of King's Bench. But in actions on policies, where there is a consolidation rule, and money is paid into court, the Plaintiff is entitled to the whole costs of the short causes up to the time when the money is paid into court, although he may not succeed in the cause which he proceeds to try, and although the Defendant in that cause is entitled to the whole costs. And this explains the cases of *Muller* v. *Hartshorne*, and *Wilton* v. *Place*, which do not accurately express the opinion of the Court. And there is no reason why the practice now uniformly established, and which is so consonant to justice, should be altered.

Rule refused.

Note, the prothonotary said, that the reason of the case of *Wilton* v. *Place*, was, that although no consolidation rule had actually been drawn up there, yet, as there was an understanding between all the parties that there should be one, they were considered to be in the same plight as if the rule had been actually entered into.

PARSONS *v.* SCOTT.

May 24.

A vessel chartered to *Oporto*, *St. Ubes*, and *Gottenburgh*, being taken at *Oporto* by the enemy, was liberated on payment by the master of a sum of money, and on condition of his bringing home in her to *England*, *English* prisoners, to be exchanged for an equal number of *French*. Upon the news of the capture, but after the time of the ship's liberation, the owners abandoned the ship to the insurers. Upon her arrival at *Portsmouth* the captain refused to deliver her, unless on repayment of the ransom, which the owner refused. Held, that the owner being entitled to retake his ship, which was safe at *Portsmouth*, the loss of the voyage did not enable him to recover upon a policy on the ship as for a total loss; nor could he recover, as for an average loss, the sum which had been paid by the master for the ship's ransom, and which, being an illegal payment, the Plaintiff was not bound to repay to the master.

THIS was an action upon a policy of insurance effected on the 13th *December* 1808, upon the ship *Little Mary*, at and from *Plymouth* to *Oporto*, or *St. Ubes*, both or either, and during her stay at *St. Ubes*, and thence back with a cargo of salt to *London*: the policy provided for a return of 2 *per cent.* premium, if she sailed with convoy from *Portugal*, and 2 *per cent.* more, if she sailed with convoy from *Portugal* and arrived. The declaration stated a loss by capture. Upon the trial of this cause at *Guildhall*, at the sittings after *Trinity* term 1809, before *Mansfield* C. J., it appeared that the *Little Mary* sailed from *Plymouth* with convoy with a cargo, and arrived at *Oporto*: she remained there a month, being prevented by tempestuous weather from proceeding to *St. Ubes*, to take in a cargo of salt, according to her destination. On the 29th of *March* 1809, Marshal *Soult*, with a *French* force, having entered *Oporto*, took possession of this vessel, and took out the master and all the hands. A contract was afterwards made between *Soult* and the master, that upon payment of three thousand dollars, the ship should be liberated and permitted to proceed to *England* as a cartel ship (*a*), with a number of *English* prisoners who were detained at *Oporto*, upon condition either that

(*a*) See this contract more particularly stated in *Webb* v. *Brooke*, *post*. *Trin*. term, 1810

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the *English* government should liberate an equal numbei of *French* prisoners, or that the master should again render himself, with the vessel, to the custody of *Soult*. The master accordingly paid the money; and, on the 19th of *April*, with a crew, consisting not of his own men, but of the liberated prisoners, sailed with the vessel in ballast, and arrived at *Portsmouth* on the 13th of *May*. The *English* government did so far ratify this contract, that they sent back the captain of a *French* vessel, the *Mercure*, and some *French* seamen, in exchange for *Brooke*, the master of the *Little Mary*, and the persons who came home with him. The Plaintiff having heard of the capture, and not having heard of the liberation of the ship, had, on the 1st of *May*, given notice of abandonment to the underwriters, as for a total loss. The master refused to deliver up the ship to the Plaintiff, unless he would repay him the sum of three thousand dollars; which the Plaintiff refused; and, at the time of the trial, the vessel continued in the possession of the master. The jury found a verdict for the Plaintiff as for a total loss, with liberty for the Defendant to move to enter a nonsuit, upon the ground that the ship was not lost; for that she was destined to go to *Portugal*, and come back again; and that she did go, and did return.

Accordingly, *Best* Serjt., in *Michaelmas* term, obtained a rule *nisi* to set aside the verdict and enter a nonsuit, and counsel were twice heard upon the rule: the first time in *Hilary* term 1810; when the Court, thinking that much might depend upon facts which did not appear with sufficient distinctness at the trial, suggested the propriety of introducing further documents, which the parties accordingly agreed to admit as evidence in the case. The effect of these was, that the contract with *Soult* appeared to be of the nature above expressed; and that, by a charter-party which transpired, the ship was chartered

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chartered from *Plymouth*, with a cargo to *Oporto*, thence to *St. Ubes* in ballast, to obtain a cargo of salt, and thence to *Gottenburgh*, or some other port in the *Baltic*. And the Defendants rested upon this last circumstance as a proof that the voyage was lost, because the market for the salt was during the fishing season, which had elapsed pending the delay occasioned by the capture and detention of the ship; but there was no stipulation in the charter-party for the ship's return to *England*: and therefore when the rule was discussed a second time, in this term, *Best* contended that it was proved by this charter-party that the ship never sailed on the voyage insured, but had sailed on a wholly different voyage, so that the risk never commenced: but on the Plaintiff's retorting, that if so, he was entitled to a verdict for a return of the entire premium, *Best* abandoned this ground, and made his election to consider the voyage commenced as the voyage ensured, and to stand on the merits. The latest statute which is material to the case, 45 *Geo. 3. c.* 72. *s.* 16., enacts, that it shall not be lawful for any of his majesty's subjects to ransom, or to enter into any contract or agreement for ransoming, any ship or vessel belonging to any of his majesty's subjects, or any merchandize or goods on board the same, which shall be captured by the subjects of any state, at war with his majesty, or by any persons committing hostilities against his majesty's subjects, unless in the case of extreme necessity, to be allowed by the Court of Admiralty.

Shepherd and *Lens*, Serjts. shewed cause against the rule. The Plaintiff is entitled to recover, either, 1st, for a total loss, because the use of the ship is lost for the voyage; or, 2dly, for an average loss to the amount of the money paid to redeem the vessel. 1st. This is a total loss, for several reasons: first, it is clear that it was a total loss for a month after the capture, and there was a

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consequent abandonment before it was known that the loss was reduced by the restoration of the ship. In order to do away the total loss, the restoration must be such that the owner may be at liberty to pursue his voyage. The property was, by the capture, devested out of the Plaintiffs; in order to revest it, it was necessary either that it should come into the actual possession of the Plaintiffs, or that they should adopt, or be bound in law to adopt the master's act in ransoming the vessel; but the ship in fact has never come into the Plaintiff's possession; for they have refused to pay the money or to redeem the vessel on those terms: and if the ransom was an illegal act, the law will not bind the owners involuntarily to adopt it. Secondly, it is not every restoration of the hull of the ship that will do away the total loss which *primâ facie* was sustained by the capture, and revest the property devested by the abandonment. In all the cases where the total loss has been done away, the ship has been restored in such a state as to be capable of prosecuting the voyage; and the voyage has afterwards been absolutely completed: but here the voyage was totally lost. The purpose, which was to obtain a cargo of salt at *St. Ubes*, and deliver it within the fishing season, is wholly gone; for the fishing season is elapsed. When the vessel left *Oporto*, it was impossible for the master to continue his voyage, for he had no crew: he had not a single man on board whom he could compel under any subsisting contract to proceed to *St. Ubes*. He was obliged on his parol to proceed to *England*, and the law will recognize the validity of the obligation: he was still virtually under the dominion of *Soult*. His vessel was not actually manned with *Frenchmen*, but the effect was the same as if she had been; and she arrived at *Portsmouth*, not in the prosecution of any mercantile adventure, but as a *French* ship bringing prisoners. It would be a wholly new rule if the Court were to

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say that in every case where the ship is capable of being fitted out and sent to sea again, there cannot be a total loss. All the cases shew, that wherever there is a loss of the ship for that voyage, it is a total loss for the purpose of the insurance. The case of *Goss* v. *Withers*, 2 *Burr.* 683., in which there were two policies, one on the ship and the other on the cargo, generated an opinion in the profession, that after a capture had once taken place, there was, in all events, an absolute loss. In *Hamilton* v. *Mendez*, 2 *Burr.* 1198., Lord *Mansfield* C. J. takes pains to correct that doctrine, and to shew that it is a total loss, only "if the voyage is absolutely lost or not worth pursuing." *Milles* v. *Fletcher*, *Doug.* 219. his Lordship said, "No cases say, that the bare existence of the hull of the ship prevents the loss from being total. The question is singly this, whether the consequences of the capture were such as, notwithstanding the re-capture, occasioned a total obstruction of the voyage, or only a partial obstruction, as in *Hamilton* v. *Mendez*." And again, "The point is, what did the owner suffer by the capture? and it appears that he suffered so much, that it was not worth while to pursue the voyage." In a manuscript note of the same case, the rule is laid down in the same manner. *Cazalet* v. *St. Barbe*, 1 *T. R.* 187. *Willes* J. said, "there has been no loss here, either of the ship or the voyage:" and *Buller* J. said, "The true way of considering it is this; it is an insurance of the ship for the voyage; if either the ship or the voyage be lost, that is a total loss." So in *Manning* v. *Newnham*, 2 *Marshal*, 585. on a policy upon a ship, Lord *Mansfield* said, "If by the perils insured against, the voyage be lost and gone, it is a total loss, otherwise not." *Bainbridge* v. *Neilson*, 10 *East*, 329., does not militate with this doctrine; that case only determined, that if by subsequent events the total loss is reduced to

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an average loss, the assured has no right to persist in an abandonment. But this loss cannot be reduced to a partial loss, because it is clear that the object of the voyage can now never be obtained. It is true that a ship is physically capable of completing her voyage, as long as her planks will hang together; but the merely getting to a given place, or loading with a particular article, at any time and at any price, and under any circumstances, is not the object of a voyage. This vessel could not have proceeded to *St. Ubes*, unless she had taken a new crew at *Portsmouth*, and sailed from thence; but that would not have been a prosecution of the same, but of an entirely new voyage. It is impossible that upon the ship's arrival at *Portsmouth*, the freighter could have recovered against the owner in an action on the charter-party, upon the ground of his not proceeding thence to complete the voyage to *St. Ubes*. If it be now incumbent on the owner to continue the voyage, the same necessity would have subsisted if the *French* general had detained the vessel three years: but although the ship in specie remains, the freight and opportunity of obtaining a cargo are totally lost. Again, if this is not a total loss, yet the master is entitled to recover against the owners the sum paid for ransom, and that constitutes an average loss; for the case is distinguishable from that of *Havelock* v. *Rockwood*, 8 *T. R.* 268. because there the ransom was clearly illegal: there, too, the owners recognized the act of their agent in ransoming the vessel, and took her back again. Whereas here, if this was an illegal ransoming, the owners had done no act to affirm the contract made with *Soult*. But the Plaintiff is at least entitled to a return of the 2 *per cent.* premium upon the ship's arrival at *Oporto*; and if this is not a total loss, she has also arrived in this country; and upon that event the Plaintiff is entitled to a return of 2 *per cent.* more: this case is distinguish-

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able from that of *Kellner* v. *Lemesurier*, 4 *East*, 396., where Lord *Ellenborough* C. J. thought the ship's arrival at her port of discharge must precede any return.

Best and *Vaughan*, Serjts. *contrà*. All the cases cited were considered in that of *Bainbridge* v. *Neilson*, which is decisive of the present question, and has established as a principle, that if the Plaintiff relies on an abandonment and a total loss, and the fact is, that at the time of the abandonment the total loss did not subsist, his case is gone. That was an attempt to convert a partial loss into a total loss, but without effect: here the Plaintiff omitted to prove, but in fact might have proved, a small partial loss, less than 13½ *per cent.* Lord *Ellenborough*'s judgment in *Bainbridge* v. *Neilson*, is very applicable here. The present Plaintiff did not abandon till the 1st of *May*; whereas his ship was released on the 19th of *April*. It is not true that the ship afterwards continued to be virtually in the possession of *Soult*. If he had exacted of the master security for his going to *London*, and not to *St. Ubes*, perhaps there might be some colour for this pretence; but as soon as the master had paid his three thousand dollars, and had cleared the bar of *Oporto*, he was at free liberty to proceed to *St. Ubes*; but he found it more profitable to convey passengers to *London*. [*Mansfield* C. J. and *Lawrence* J. It appears he could get no crew, except sailors collected from various ships, who were all desirous to come to *England*: he could not proceed alone to *St. Ubes*.] Admitting that, he merely loses the freight to *St. Ubes*; but no case has decided, that the mere loss of the profit of the voyage entitles the assured to abandon the ship. Insurance is a contract of indemnity; but if upon the loss of a single voyage, the owner could recover the whole value of his ship, the effect

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effect would go far beyond an indemnity; for the Plaintiff would be enabled to recover where he had sustained no loss at all. In all the cases wherein the loss of the voyage has been an ingredient, it is not merely the loss of the immediate advantage of the voyage which has had weight with the Court; but there has been an extreme improbability that the vessel itself should ever be restored, or at least a reasonable ground of belief that the property would be lost, unless the assured should incur considerable expence to recover it. So in *Hamilton* v. *Mendez*, 1 *Park*. 6th *ed.* 207. Lord *Mansfield* C. J. says, "It does not necessarily follow, that because there is a re-capture, therefore the loss ceases to be total. 'If the voyage be so defeated as not to be worth the farther pursuit; if the salvage be high, and the other expences great, or if the underwriter refuse to bear these expences, the assured may abandon." He therefore thought that many circumstances must concur to create a total loss, when the ship in *specie* remains. In *Hamilton* v. *Mendez*, although the ship was captured, and the crew taken out, and a prize-master put on board, and an abandonment made, yet, inasmuch as there was a re-capture, Lord *Mansfield* held that the ship was not totally lost. The case of *Milles* v. *Fletcher* is not applicable in the present instance. There no sailors were to be had, the ship was at a distance from home, nearly all her remaining cargo was sold to pay her salvage, and the expence of the repairs would have exceeded the value of the freight by more than 100*l*. That ship could not pursue her voyage, and it was the best thing for all parties to sell her. This vessel is in the country of the owner, at *Portsmouth*, where sailors are to be had, uninjured, and in no respect under similar circumstances. A mere interruption of the voyage gives no right to abandon: the Plaintiff can recover only for so much loss

as

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as he can shew that he has sustained. But to create a total loss, the ship must be in such a condition that even if the owner were willing, he could not perform the voyage: if he can complete the voyage, he is bound so to do. Here, the owner being bound by a charter-party, it was incumbent on him, on the ship's arrival at *Portsmouth*, to set out again on this voyage: there was no physical impossibility of his completing it. In *Manning* v. *Newnham*, the ship "was declared unable to proceed to sea with her cargo upon a *London* voyage, and she could not be repaired in any of the *English* islands in the *West Indies*." That was a physical impossibility of performing the voyage. Lord *Mansfield* says, "The ship had received an irreparable hurt within the policy, which drove her back to *Tortola*, where only two ships could be had, both together not capable of taking the whole of the cargo on board. The voyage was so completely lost, that no ship could be got, and the insured were unable to send that part of the goods which they had purchased forward to *England*, and yet nobody bought goods there but to send to *England*. If the voyage could have been continued in another ship, there might have been freight *pro ratâ*. But it was admitted, that there was a total loss on the freight, because the ship could not perform her voyage, and the insured were not to wait till ships could be had. The same argument applies to the ship and cargo, and the contract is, that the ship shall come to *London*." *Bainbridge* v. *Neilson* shews that the circumstance of want of knowledge of the true state of the facts at the time of the abandonment, makes no difference in the rights of the parties. The condition of the men, who came home in the vessel can make no difference in the state of the ship; the ship was restored to the master, and consequently the owner could have no right to abandon. It is urged, that the Plaintiff has a right to recover, because he is innocent, and has not adopted the act

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of the captain: but the Plaintiff is not damnified, for the captain cannot recover against him the money which he has paid in his own wrong (*a*), and the Plaintiff may retake his vessel at pleasure, and free of all expence, or recover for it in trover. The underwriters, therefore, would pay this sum for the benefit of the captain only, who is not a party insured. As to the question of the return of 2 *per cent.* upon the ship's arrival, in *Kellner* v. *Lemesurier* it was held, that the arrival which entitles the assured to a return of premium, must be an arrival at the ultimate port of discharge. The Defendant, therefore, is on every point entitled to a nonsuit.

Upon the first argument MANSFIELD C. J. said, If a capture has occasioned the loss of a voyage, although the ship remains in such a state that she may be repaired, and may again be taken possession of by the owner, yet it is a total loss. But then the question arises, what shall be deemed a loss of the voyage? that admits of great argument. It might not have been worth while in this case to provide a new crew, without which the vessel could not proceed, and afterwards to go to *St. Ubes* to procure the salt. If the owner is himself the merchant, he loses the profits of his voyage; if not, he loses his freight; but how is the ship lost? In *Goss* v. *Withers*, Lord *Mansfield* takes various circumstances into consideration; the perishable nature of the commodities, the absolute defeating of the voyage, the heavy amount of salvage, the captivity of the master and mariners, and the loss of the freight; and there he held, that it was immaterial whether it were not the effect of recapture to re-vest in the owner the property of the captured vessel.

(*a*) See the case of *Webb* v. *Brooks*, *Trin.* term, 1810, *post.*

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LAWRENCE J. The *dicta* in the authorities cited certainly go great lengths; they assert generally, that wherever the voyage insured is defeated by any of the perils insured against, there is a total loss: but I find no authority which applies to the case where the ship was, or might have been in the hands of the owner, in the country where the owners reside. The passage from the *Guidon*, *c.* 7. *s.* 1. which was the original authority on which Lord *Mansfield* relied in the case of *Goss* v. *Withers*, does not apply to the ship; and one may conceive very strong cases; as, suppose a ship bound for the *Baltic*, should be chased into a port, and blockaded there till the *Baltic* is frozen: her voyage is lost; but in the ensuing spring she returns to *England* in safety: how is the ship lost? In *Manning* v. *Newnham*, a loss of the voyage, as to the ship, did arise, though it did not arise as to the cargo, which was immediately sold on the spot for nearly its whole value.

Upon the second argument the Court held, that there was no total loss in this case. The ship had been detained, but was now safe; and there could not, under the circumstances, be any return of the premium; consequently that there must be a nonsuit.

Rule absolute.

1810.



[IN THE EXCHEQUER-CHAMBER.]

In Error.

May 26.

Bowen *v.* Morris.

The highest bidder for certain lands sold by auction, and the mayor of a corporation, on behalf of himself and the rest of the burgesses and commonalty of the borough the vendors of the lands, signed a contract, in which they mutually promised to fulfil the conditions of sale on their respective parts. The conditions stated the title of the corporation to the premises, and stipulated that they should convey, and might re-sell on default. The only act therein mentioned to be done by the Plaintiff was the receiving the deposit. Held that the Plaintiff could not maintain an action in his individual capacity against the purchaser for breach of this contract.

THE Defendant in error declared in the Court of King's Bench in an action of *assumpsit*, and stated in his second count, that the mayor, burgesses, and commonalty of the borough of *Carmarthen*, on the 14th of *May* 1804, were about to put up to sale, and to sell by public auction, by a certain auctioneer employed in that behalf, in several different lots, certain messuages and tenements, whereof they were seised in fee, upon and subject to certain terms and conditions of sale, which were stated in the count; that the premises were, under the said terms and conditions, in the presence and hearing of the defendant below, put up to sale by public auction in different lots, and that the Defendant below became the purchaser of certain messuages, lands, and tenements, comprised in the thirty-fifth lot, at the price of 1000*l.* And that thereupon, afterwards, in consideration that the Plaintiff below, then and there being the mayor of the said corporation, then and there *on behalf of himself and the rest of the burgesses and commonalty of the said borough*, undertook that the said mayor, burgesses, and commonalty would perform and fulfil to the Defendant, as the purchaser of the premises comprised in that lot, all the aforesaid terms and conditions of sale on the behalf of the vendors to be done and performed respecting the same, he, the Defendant below, undertook to perform the terms and conditions of sale on his part, as such

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purchaser. The Plaintiff below then averred, that the mayor, burgesses, and commonalty. were, at all times after the sale, able, ready, and willing to execute a sufficient and proper conveyance of the premises comprised in the said lot to the Defendant below, according to the said terms and conditions, if the Defendant below would pay the purchase-money thereof, and they averred notice and request to the Defendant below to pay the purchase-money, and accept a conveyance of the lot, according to the terms of sale, and a refusal by him. The declaration then proceeded to state, that the premises, in pursuance of the terms of sale, were resold *by the said mayor, burgesses, and commonalty*, and that the deficiency, and the expences attending such re-sale, amounted to 530*l.* which the Defendant below was requested to pay; but that he refused, nor had he paid the amount to the said *mayor, burgesses, and commonalty*, or to the Plaintiff below, or to any other person whatsoever. The Defendant below pleaded the general issue.

This cause was first tried at the *Hereford* summer assizes 1805, before Lord *Ellenborough* C. J. when the evidence for the Plaintiff below was, that he, being mayor of the borough of *Carmarthen*, and the mayor, burgesses, and commonalty of that borough being seised in fee of the tenements in the declaration mentioned, they, the mayor, burgesses, and commonalty, on the 14th of *May* 1804, put up the same, and also certain other tenements, to sale by public auction, in different lots, according to certain conditions of sale then produced, and corresponding with the averments in the declaration, viz. (amongst others immaterial to the case,) that, 4thly, the purchaser of each lot should pay down immediately, as a deposit, on being declared the highest bidder, 10*l.* *per cent.* in part of the purchase-money, into the hands of *Thomas Morris*, Esq. the then mayor, and should sign an agreement for

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for payment of the remainder on or before the 1st day of *August* next, and that an agreement should be drawn and prepared for execution by the proper parties, by the town-clerk of the corporation, at the expence of the sellers. 5thly, That the purchaser of each lot should have a deed of feoffment executed to him of such lot at the expence of the *sellers*, on payment of the remainder of the purchase-money. 6thly, That the purchaser or highest bidder for that lot was to receive no rent from the lands therein comprised until *Michaelmas* 1806, when the present lease thereof would expire; as the *corporation* was to continue to receive the rents and profits, under that lease, until that time; but the *sellers* were to pay to the purchaser or highest bidder, 5*l.* *per cent.* for his purchase-money, until the expiration of that lease, in lieu of rent. 7thly, That the *sellers'* title to the premises comprised in this lot, was, under his present majesty's charter or letters patent, granted to the *corporation* of *Carmarthen*, under the great seal in 1764. 9thly, That if any purchaser should fail to comply with those conditions, the deposit-money for his lot should be forfeited, and the *proprietors* should be at liberty to re-sell the lot, and the deficiency, if any, by such second sale, together with all charges, should be made good by the defaulter. Lastly, that the forfeiture of the deposit-money should not prevent the *sellers* from proceeding at law or equity against such best bidder, to oblige him to complete the purchase, as the *sellers* should think proper. That the tenements in question were so put up to sale in the thirty-fifth of the lots mentioned in the conditions; and that the Defendant below had notice of the sale, and of the conditions, and was present at the sale, and then became the highest bidder for, and the purchaser of the same lot, at the sum of 1000*l.*; and that the following agreement was thereupon written at the foot of a copy of the conditions, and subscribed by the Plaintiff

and

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and Defendant below respectively, viz.: the abovementioned premises comprised in lot 35, were this day sold to *David Bowen*, (the Defendant below,) for 1000*l.* subject to the conditions of sale within-mentioned, and *David Bowen*, the purchaser, or highest bidder of the said lot, and *Thomas Morris*, Esq. the mayor of the said corporation, on behalf of himself and the rest of the burgesses and commonalty of the borough of *Carmarthen*, the vendors of the premises, do hereby mutually agree to perform and fulfil, on each of their parts respectively, the within conditions of sale. Signed, *T. Morris*, mayor. *David Bowen*. That on the 23d of *June* 1804, the following order was made by the mayor, burgesses, and commonalty of the borough, assembled at a corporate meeting held at the *Guildhall* of the borough, upon due notice given in pursuance of their charter, viz.: Whereas in pursuance of several orders, bearing date the 4th and 9th days of *November* last, the 5th day of *March* last, and the 10th day of *April* last, several messuages and hereditaments, part of the corporation estate, were sold and disposed of by public auction in different lots, to several persons, at and for the price or sum of 15,434*l.*: And whereas *Thomas Morris*, Esq., the present mayor, signed contracts for the sale of the said hereditaments and premises to the several purchasers thereof, it is therefore ordered that such sales, and the contracts signed by the said *Thomas Morris*, be confirmed and carried into execution; and that the deposit monies be paid by the purchasers into the hands of the said *Thomas Morris*; and that his receipts for the same respectively shall be good and sufficient discharges to such purchasers for such deposit and purchase monies; and that such purchasers shall not be answerable or bound to see to the application, non-application, or misapplication of such purchase monies, or any part thereof; and that the said *Thomas Morris* do, on receipt of such monies respectively, pay the same into the bank of Messrs.

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David Morris and Sons, bankers in *Carmarthen*, for safe custody, until further directions be given by this corporation for the application thereof; and that a letter of attorney or letters of attorney, be made to empower *John Meredith* of this county, borough-agent, to deliver livery of seisin of such hereditaments and premises, so sold as aforesaid, to the several purchasers, or to whom they shall respectively direct and appoint. And it is further ordered that in case the purchasers, or either of them, shall refuse or neglect to pay the deposit or purchase monies or either of them in manner aforesaid, or to complete their purchases agreeably to their contracts, actions or suits shall be brought against such purchasers either at law or in equity, at the expence of this corporation, and under the directions of the said *Thomas Morris*, for the recovery of such deposit or purchase monies: and also to compel such purchasers respectively to complete such their purchases; or that the said mayor re-sell the said premises by auction, in case of the non-performance of such contracts by the purchasers, agreeably to the terms thereof. *T. Morris*, Mayor. That pursuant to the said order, the mayor, burgesses, and commonalty of the borough, were, after the sale and signing of the said agreement by both parties, and before the re-sale hereinafter mentioned, able, ready, and willing to have conveyed the said tenements, in pursuance of the said agreement; and in due manner and time tendered to the Defendant below the draft of a deed of feoffment, for his perusal and approbation thereof, and required him to complete his contract, and pay the purchase money according to the said agreement; and gave notice to him of their readiness to execute a conveyance of the premises. And that he wholly refused to complete the contract, or to accept any conveyance of the premises, or to pay the purchase money thereof: whereupon the said mayor, burgesses, and commonalty, on the 27th of *September* following, re-sold the premises for 570*l*., as stated

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stated in the declaration: upon this evidence a verdict was first found for the Plaintiff below. In the following term a motion was made in the Court of King's Bench for a new trial, when the Court were equally divided in opinion: wherefore the cause was again tried at the *Hereford* spring assizes 1806, before *Lawrence* J., who, upon the same evidence, thought the Plaintiff below entitled to a verdict on the second count of the declaration, but recommended a bill of exceptions; which being tendered by the Defendant below, he sealed accordingly. The jury found their verdict for the Plaintiff below, with 430*l*. damages, upon the second count of the declaration; and for the Defendant below upon the other counts.

This case was twice argued; first, in *Easter* term 1808, by *Lord* for the Plaintiff in error, and *John Jones* for the Defendant in error: the second time in *Trinity* term 1808, (*Heath* and *Lawrence* Justices being absent,) by *Peake* for the Plaintiff in error; and in the *Michaelmas* term following, by *Abbot* for the Defendant in error. Upon the second argument three points were contended on behalf of the Plaintiff in error: First, that upon the true construction of this agreement, the mayor had contracted as agent and manager for the corporation; so that it was a contract between the buyer and the corporation, not between the buyer and the Defendant in error; and that therefore the Defendant in error could not maintain this action. Secondly, that if it were a contract with the Defendant in error, yet, being made with him for the benefit of a third party, and all the important considerations moving from that third party, the corporation only could maintain an action upon the contract; and that the Defendant in error could not. Thirdly, that if it were regarded as a contract made with the Defendant in error, it was void for want of a consideration moving from him.

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The first point must entirely depend upon the construction of the instrument itself. The whole tenor of the conditions of sale contemplated that the dealing was with the corporation. It is true that the deposit is to be paid to the Plaintiff below, because he happened to be the present mayor; but the receipt of that money is the only act he has to perform. The agreement for the purchase, and the deed of feoffment, were to be at the expence of the sellers: the corporation were to receive the rents of the premises till 1806; the sellers were they who were to pay interest on the purchase money in the mean time: the seller's title was the charter of the corporation: it was to the proprietors that the liberty of re-sale was reserved: and the sellers were they who might proceed, notwithstanding a forfeiture of the deposit, to enforce a specific performance as they should think proper. The Plaintiff below signs his name in the corporate capacity of *mayor*, adding that word to his signature; not in his individual capacity; or rather, he subscribes this contract, not as principal, but as agent for the corporation. And if he did not individually contract with the Defendant below, the Defendant below did not contract with him individually. Therefore, if the corporation had refused to convey, the Plaintiff below would not have been liable in an action by the Defendant below. *Unwin* v. *Wolseley*, 1 *Term Rep.* 674. The Defendant contracted by deed, on account of his majesty, to pay freight. The Plaintiff brought covenant, and it was held that the action would not lie. *Macbeath* v. *Haldimand*, 1 *T. R.* 172. It was there also decided, that an agent contracting for the service of government, does not render himself personally liable. If those cases be law, upon what principle can this person, contracting on behalf of a corporation, be distinguished from a contractor on behalf of his majesty. *Piggott* v. *Thompson*, 3 *Bos. & Pull.* 147. is a strong case to shew, that although a contract

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tract be in writing, it must be interpreted, not according to the strict letter, but according to the understanding of the parties: there the Defendant hired the tolls of a gate and toll-house, and contracted to pay the rent to the treasurer of the commissioners, the officer whose duty it was to receive it; yet it was held that the treasurer could not maintain an action for the rent. [*Mansfield* C. J. In that case the Defendant alone signed the contract: the promise was not made to the treasurer, though it was a promise to pay to the treasurer.] This case is not even so strong: the Defendant below does not promise to *Morris:* the Defendant promises; to whom the promise is made is a result of law; and the Plaintiff, as one of the corporation, in his corporate capacity, promises that the agreement shall be performed. Although in the case of *Appleton* v. *Binks*, 5 *East*, 148., which will probably be relied on for the Defendant in error, the Defendant covenanting on the part and behalf of Lord *Rokeby*, was himself held personally liable; yet that was, because it was held evident that he meant to bind himself and his heirs as sureties for Lord *Rokeby*'s performance. Besides, that was the case of a deed under seal, wherein no consideration was necessary: this being a parol promise, a consideration was necessary: but the Defendant in error was to do no one act whatever. The corporation were to do every thing mentioned in the agreement; they were to receive all the benefit; the Plaintiff below none. It was therefore, both in fact and in law, a contract by the corporation. Upon the second point, supposing any action at all can be maintained upon this contract, it lies at the suit of the corporation; because all the real and beneficial considerations are moving from the corporation. *Levett* v. *Hawes*, *Cro. Eliz.* 619. 652. The Plaintiff declared in *assumpsit*, that in consideration that he would assure lands of the annual value of 10*l*. for the jointure of his daughter

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upon her marriage with the Defendant's son, the Defendant undertook to give 200*l.* to his son in marriage with her, and that he had not paid the 200*l.*; and it was moved in arrest of judgment that the action ought to have been brought by the son, who was to have the benefit, not by the father: the Court gave judgment for the Defendant, and over-ruled a case there cited of *Cardinal* v. *Lewis*, in which it had been held that the father might sue. *Rippon* v. *Norton*, *Cro. Eliz.* 849. 881. The Defendant's son having assaulted the two Plaintiffs, father and son, the father complained to a justice, and required the peace: and in consideration that the father and son would cease from further complaint, the Defendant undertook that his son should keep the peace towards both of them: but he afterwards assaulted and disabled the Plaintiff, the son; whereon the father brought *assumpsit:* but the Court held it would not lie, as he did not aver that the son was his servant. The son afterwards brought *assumpsit*, and recovered Damages. *Dutton and Wife* v. *Poole*, *T. Jon.* 102. S. C. 2 *Lev.* 210. *T. Raym.* 302. 1 *Vin. Abr. Assumpsit*, 337. *pl.* 21. The father of the wife being about to cut timber of the value of 1000*l.* for her portion, the Defendant, who was his heir, undertook, that if he would leave the timber standing at his decease, he, the Defendant, would pay the wife 1000*l.* After the decease of the father, the husband and wife sued for the money, and recovered; and the judgment was affirmed upon error brought in the Exchequer Chamber. It was there held, that the daughter might sue for the money, because she could release it. If the Defendant in error, therefore, could support this action, he could release it: but all the benefits of the contract are to result to the corporation, which it is impossible he alone should release. *Sadler* v. *Payne*, *Savile*, 23. The Plaintiff declared that he had sold to the Defendant land worth 100*l.* and that

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one *Duckct*, at the Plaintiff's request, treated with the Defendant for a reasonable consideration to re-assure it: and that in consideration of 50*l.* agreed to be paid by *Duckct*, the Defendant promised to re-assure the land to the Plaintiff. It was objected in arrest of judgment that the consideration passed from *Duckct*, and that no consideration moved from the Plaintiff; but the Court held that it should be presumed to be his act, and gave judgment for the Plaintiff. *Martyn* v. *Hinde*, *Cowp.* 437. and *Marchington* v. *Vernon*, 1 *Bos. & Pull.* 101. *in notis*, were cited in a note to *Pigott* v. *Thompson*, to shew that if one person makes a promise to another for the benefit of a third, that third may maintain an action upon it. It is said that either the agent or the principal may sue upon a policy of insurance; but that is by the law-merchant, which, until within a century past, has not been the law of *England*. As to the third point, in case this is a contract with the individual, by which the corporation is not bound, there is no consideration for the promises, as appears by the case of *Nerot* v. *Wallace*, 3 *Term Rep.* 17. where it was held that no action could have been maintained upon a promise made by the Plaintiff, that a third party, over whom the Plaintiff had no controul, should abstain from doing a certain act, and that therefore that promise could not be made a consideration for a promise by the Defendant. [*Mansfield* C. J. That was an illegal consideration.] Lord *Kenyon* C. J. relied on this ground; but the principle does not rest upon his authority only. There was therefore no consideration for the promise in the present case, because the Plaintiff below could not compel the corporation to perform the contract. Lord *Kenyon* C. J. held that there must be a power in law as well as in fact to do that which is promised. [*Graham* B. observed that the Plaintiff had actually performed his promise, for a conveyance had been tendered.] *Harvey* v. *Gibbons*, 2 *Lev.* 161. In consi-

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deration that the Plaintiff, who was bailiff to *J. S.*, undertook to discharge the Defendant from a debt of 20*l.* due to *J. S.*, the Defendant undertook to lay out 40*l.* in repairing a barge of the Plaintiff. Verdict and judgment given for the Plaintiff were reversed, because the consideration was illegal: for the Plaintiff could not discharge a debt due to his master. The present verdict therefore cannot be supported.

Abbott, in *Michaelmas* term 1808, for the Defendant in error. The written agreement at the foot of the condition is a contract made by the Defendant in error individually for the performance of the conditions of sale by the corporation. The corporation themselves could be bound in law only by an instrument under seal, whatever might be the effect in equity of a contract by their agent; and therefore there was very good reason why the Defendant in error should enter into a personal contract with the purchasers. [*Mansfield* C. J. The declaration avers that the Defendant in error undertook, not that he would convey, but that the corporation should convey: now the contract is, that the Defendant in error, on behalf of himself and the rest of the corporation, undertook to fulfil the conditions of sale. Thus far it is, in words, different from the contract alleged, that the corporation should convey; and it is singular, if he were contracting for himself, that he should add the words, "on behalf of the rest of the corporation."] He binds himself individually, that himself (the mayor), and the rest of the corporation, shall, in their corporate capacity, perform the act. A man may bind himself for the acts of others if there is nothing illegal in them. The Courts will so construe every instrument, *ut res magis valeat quam pereat*. The corporation could not have sued on this contract, because it was not under seal; and if the Defendant in error may not sue on it, no one can; but

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but the contract must fall to the ground. In the case of *Thompson* v. *Piggot* there was no contract made with the plaintiff. The cases of *Unwin* v. *Wolseley*, and *Macbeath* v. *Haldimand* are anomalous cases of agreements made by persons contracting on behalf of the public, very different from the case of a private corporation. The case of *Williams* v. *Millington*, 1 *H. Bl.* 81. is strongly with the Defendant in error: there the auctioneer sold goods in the owner's house, and with the owner's name on the catalogues, yet it was held that the auctioneer was entitled to recover for the price. In *Sadler* v. *Evans*, 4 *Burr.* 1984., the reason why no action could be maintained against the agent, was, that the money had been paid over. In *Fronton* v. *Small*, 2 *Ld. Raym.* 1410. the lease itself was made by the attorney, who shewed on her declaration that she had no estate in her own name, and therefore void. It can make no difference whether the party assuming for the act of another be Plaintiff or Defendant; and if so, this case is not distinguishable from that of *Appleton* v. *Binks*. If the contract were read thus, that the Defendant in error, for himself, and on behalf of the vendors, contracted, it clearly would be his individual personal contract, and the addition of the words on behalf of the corporation do not vitiate or make it the less his personal contract: those words were in *Appleton* v. *Binks*. The word mayor is only descriptive of the character of the contracting party: it does not alter the nature of the contract. The word himself is here used equivocally; but it does not mean that he, contracting on behalf of himself, in his corporate capacity, undertook to convey: it was not his intention to mix himself individually with the corporation: it is only that he, happening to be mayor at the time when he made this contract, and contracting in his individual character, undertook that the mayor, who happened to be himself, and

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and the rest of the corporation, should convey. [*Mansfield* C. J. Supposing that he had made this contract without authority! Could not the buyer maintain an action against him?] Yes, *ex delicto*. As to the second point, that supposing this to be a personal contract, yet that being for the benefit of another, the party interested, and not the party contracting, is to sue upon it; it is by no means necessary, to enable him to maintain an action, that the benefit of the contract should result to himself personally; although it is not true that all the consideration passes, as it is said, from the corporation: for the Defendant in error makes himself a stake-holder of the deposit-money; and, therefore, upon failure of the corporation to convey, liable to the holder in an action, which is a consideration. But the cases in which it is said to have been ruled that *A.* may sue upon a promise made to *B.* for the benefit of *A.*, have been misunderstood, and are well explained by *Eyre* C. J. in 1 *Bos. & Pull.* 102. *Feltmaker's Company* v. *Davis*. "As to the case put at the "bar of a promise to *A.* for the benefit of *B.*, and an action "brought by *B.*, there the promise must be laid as "being made to *B.*, and the promise actually made to "*A.* may be given in evidence to support the declara-"tion." If a charter-party be made under seal for the benefit of another, the agent who makes it is the only person who can sue thereon; and the ordinary case of policies, where the agent every day recovers sums from which he derives no personal advantages, shews that there is no difference in this respect between instruments under seal, and those which are not under seal. The third point is rather a breach of the first than a distinct question: for if the Defendant in error subjects himself by his contract to a legal responsibility, that alone is a sufficient consideration.

Cur. adv. vult.

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The judgment of the Court was delivered in the present term (*a*) by

MANSFIELD C. J., deciding that this contract did not bind the Defendant in error personally; because he did not contract on behalf of himself personally, but on behalf of the corporation, that he acted merely as an agent; and although the corporation had not constituted the mayor their bailiff or agent by instrument under seal, so that he was not competent by that contract to bind the corporation, yet as the Plaintiff in error signed it, perhaps the corporation might have sustained an action on this contract. In equity, a contract signed by one party would be enforced, and it was not clear that it was different in law. An action lies not against the known agent, who is in the light or state of a broker; and this case was within the same principle which governed the case of *Macbeath* v. *Haldimand*. The judgment of the Court of King's Bench therefore must be

Reversed.

(*a*) The Reporter was not present at the time this judgment was delivered, but he was favoured with the substance of it by a gentleman at the bar of known accuracy and knowledge.

TIGHE v. CRAFTER.

May 28.

If default be made in payment of the interest on a bond, the principal whereof is not yet due, the Court will not stay proceedings on payment of the interest and ... But *semble*, that they would restrain the execution to the interest and c...

THIS was an action of debt on bond conditioned for payment of a principal sum in 1815, and for payment of the interest in the mean time. And the action was brought on account of a default in paying the interest.

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Shepherd Serjt. had, on a former day, obtained a rule *nisi* to stay proceedings, upon payment of the interest and the costs of the action.

Lens Serjt. now shewed cause: the default in payment of the interest renders the whole bond forfeited.

The Court held that they could not stay the proceedings; the bond was forfeited: it might remain to see what should be done to restrain the execution, if the Plaintiff should levy more than was fit. But there was no ground to stay the action.

Rule discharged.

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ROBSON and WAUGH v. BENNETT and Another.

By the practice of the *London* bankers, if one banker who holds a check drawn on another banker, presents it after four o'clock, it is not then paid, but a mark is put on it, to shew that the drawer has assets, and that it will be paid; and checks so marked have a priority, and are exchanged or paid next day at noon, at the clearing-house. Held that a check presented after four, and so marked, and carried to the clearing-house next day, but not paid, no clerk from the drawee's house attending, need not be presented for payment at the banking house of the drawee.
Such a marking under this practice amounts to an acceptance, payable next day at the clearing-house.
It is not necessary to present for payment a check payable on demand till the day following the day on which it is given.
A person receiving a check on a banker is equally authorized in lodging it with his own banker to obtain payment, as he would be in paying it away in the course of trade.
Although in consequence thereof the notice of its dishonour is postponed a day, one day being allowed for notice from the payee to the drawer, after the day on which notice is given by the bankers to the payee.

THIS was an action of *assumpsit* for goods sold and delivered by the Plaintiffs to the Defendants. Plea, the general issue. The cause came on to be tried at the sittings for *London* after last *Michaelmas* term, before

Mansfield

Mansfield C. J. when a verdict was found for the Plaintiffs, subject to the opinion of the Court, on the following case.

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For the purpose of discharging a balance due to the Plaintiffs for coals sold and delivered, a check dated 11th *September* 1809, drawn on the Defendants' bankers Messrs. *Bloxam*, and signed by the Defendant *Bennett*, was delivered to the Plaintiff *Waugh* at the coal exchange on the same day between one and two o'clock in the afternoon. The coal exchange is situate in *Lower Thames-street*: the banking-house of Messrs. *Bloxam* was in *Gracechurch-street*, about 400 or 500 yards distant from the coal exchange: the counting-house and residence of the Plaintiffs were in *America-square*, in the *Minories*, and the Defendants resided at *Wandsworth*. The Plaintiffs, in going from the coal exchange to their own bankers, Messrs. *Harrison* in *Mansion-house-street*, must pass by the house of Messrs. *Bloxam*. Business at the coal exchange begins at twelve o'clock at noon, and continues until two o'clock; and from two till three o'clock the coal-factors are engaged in entering the contracts of sale of the day, and the receipts on account of sales made on previous days, at the proper office in the coal exchange, as directed by the statute. A few minutes after four in the afternoon of 11th *September* the Plaintiff *Waugh* lodged this check and four others in Messrs. *Harrison*'s banking-house, in order that they might get them paid. It is customary among bankers in *London*, in their dealings with each other, not to pay any check which is presented by or on the behalf of another banker, after four o'clock in the afternoon; but merely to give an answer to the person so presenting it, whether it is a good check or not: and in case the check is approved, a mark is made on it, either by the person presenting it, or the person who gives the answer. And a check so marked is considered as entitled

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to a priority of payment on the next day. The check in question was carried by the porter of Messrs. *Harrison*, between five and six o'clock in the afternoon of the 11th of *September* to the banking-house of Messrs. *Bloxam*, and presented to Mr. *W. Bloxam*, one of the partners in the firm, who said it was a good check, marked it accordingly, and returned it. At twelve o'clock on the next day, the 12th of *September*, a clerk of Messrs. *Harrison's* carried the check to the clearing-house in the city, (at which time and place the clerks of the several bankers are accustomed to meet, for the purpose of exchanging and paying checks marked the day before,) in order to present it for payment according to their custom; but no person belonging to or on behalf of Messrs. *Bloxam* attended at the clearing-house during any part of that day. It is the course of dealing amongst bankers who are in possession of checks drawn upon other bankers, when they have been marked as before stated, to send them on the day after they are due, to the clearing-house, to be there paid, or exchanged by the banker on whom they are drawn for other checks drawn on the banker presenting the same for payment. On the 11th of *September* the Defendants had 400*l.* in the hands of Messrs. *Bloxam*; and Messrs. *Bloxam* continued their payments until the usual hour of closing business on that day, but stopped payment at nine o'clock in the morning of the 12th of *September*, and did not pay any person on that day. The check in question was returned by Messrs. *Harrison* to the Plaintiffs on the same day; and notice of the dishonor was given by the Plaintiffs to the Defendants on the morning of the next day, being the 13th of *September*, at *Wandsworth*. The question for the opinion of the Court was, whether the Plaintiffs were entitled to recover: if they were, the verdict was to stand; but if the Court should be of opinion that the Plaintiffs were not entitled to recover, then a verdict was to be entered for the Defendants.

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Shepherd Serjt. for the Plaintiff, in stating the case, was interrupted by *Mansfield* C. J., who observed that the minute circumstances stated respecting the distance and relative situation of the places of abode and business of the parties could make no difference in the question: there must be general rules as to what shall be considered as a reasonable time for the presentment of bills: but according to the suggestions of this case it would be necessary for a man to carry a stop-watch in his pocket, in order to see whether he should have time to present a bill, or should keep it till the next morning.—*Shepherd*. The question is, whether the Plaintiff has been guilty of any such laches in dealing with this check, either on the first day or on the second, that he must now consider it as money, and must take it in payment as such. This indeed is a question of law; but it is one that in some degree arises out of the facts of the general usage. A person who gives a banker's check, must be content that it shall be treated in the course of dealing usual with bankers; for he is discharged, if it is paid according to their usual course of payment. Messrs. *Harrison* could not have returned this check on the same day on which they took it, on the ground that the bill was not paid when first presented, nor could the Plaintiff have instantly commenced an action on that account against the drawer, whose defence would have been, that he was only responsible in case the bill was not paid in due time by the drawee, who might have paid it (as the holders in like manner might have presented it) at any time on the second day: for it cannot be contended that a banker, upon receipt of every separate bill payable on demand, or at sight, is bound to dispatch a messenger to present it for payment at the first possible moment: otherwise he must keep as many clerks as he can expect to take checks in a day: and although it is a practice with bankers to present on the first day such checks as they

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they have received after a certain hour, the only effect of it is, that after a check is once marked for payment, it becomes needless to present it again on the following day at the banking-house, and it is sufficient again to present it for exchange or payment at the clearing-house. And that being the usual course of bankers' dealings, he who gives a check on a banker, recognizes the mode of dealing amongst bankers, and submits to be bound by their practice. He thereby tacitly acknowledges it to be reasonable that the payee should keep an account with a banker as well as himself. There was nothing improper in the time at which the Plaintiffs deposited this check with Messrs. *Harrison;* for a man who has a bill payable to order, has a right to indorse it over at any period before the time when he is bound to present it for payment, and that is not till the last hour of the day on which it is due: the Plaintiff therefore was not wrong in passing by Messrs. *Bloxam*'s door after he had received this check, without presenting it for payment. And unless it can be shewn, that either there was a want of due diligence in presenting it according to the usage of bankers, or that the Plaintiff was not warranted in lodging it with a banker, he is entitled to recover. On the second day there was no laches: it was unnecessary to present the check at the banking-house on that day for payment. It is found as a fact, that the custom of trade among bankers is, to pay at the clearing-house, and not at the banking-house, all checks payable amongst themselves. The marking the check for payment, then, is equivalent to an acceptance, making the draft payable next day at the clearing-house. [*Lawrence* J. suggested, that at the time the Defendant delivered the bill to the Plaintiff, it did not necessarily follow that the Defendant would deliver it to his banker; and it did not become payable at the clearing-house in consequence of any thing that passed between the Plaintiff

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tiff and the Defendant, but in consequence of a new term added to the contract between the Plaintiff and the drawee.] *Scott* v. *Lifford*, 9 *East*, 347. was an action by the indorsee of a bill against the drawer: the bill was given by the Plaintiff to his banker, who presented it when due, and it was dishonoured; his banker on the following day gave him notice of the dishonour, and he on the succeeding day apprized the Defendant: but if he had had no right to lodge his bills with his banker, he could not have been warranted in thus causing the intervention of two days' delay before the notice given to the Defendant. The right of the holder of a bill to lodge it with his bankers for the purpose of getting it paid, is therefore recognized by law. And there can be no difference in this respect between a bill payable to order and a bill due on demand; but if it be placed in the hands of a banker in the usual course of commercial transactions, and duly presented according to the practice of bankers, it is sufficient.

Best Serjt., *contrà*. The Plaintiff was guilty of laches both on the 11th and on the 12th of *September*. On the 11th, because he passed Messrs. *Bloxam*'s door; and if a man is in a condition, without inconvenience, to receive a check on the first day, he is bound to do it; if circumstances had arisen which rendered it inconvenient, he might have shewn them in evidence; but the presumption is, that a man will find it convenient to stop to receive money at any house which he passes in his walk. In *Hankey* v. *Trotman*, 1 *Bl. Rep.* 1. the jury found laches where a check given at twelve at noon had not been presented for payment the same day, and the Court refused to set aside the verdict; and in the same case *Foster* J. said, "that bankers had no right to establish a customary law among themselves at the expence of other men." In the case of the *East India Company* v. *Chitty*,

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Chitty, *Str.* 1175. it was held, that a check ought to be presented on the same day, or at furthest on the next morning. [*Mansfield* C. J. observed, that the principal point in *Hankey* v. *Trotman*, which was, that a check must be presented on the same day on which it was received, had been since over-ruled by the case of *Appleton* v. *Sweetapple*, *B. R. M.* 23 *G.* 3. which also determined, that it was a question of law, what was a reasonable time. *Lawrence* J. observed, that in the *East India Company* v. *Chitty*, the Plaintiff had till two o'clock on the second day to present, before the drawee stopped payment. Messrs. *Bloxam* stopped at nine in the morning.] It must not be allowed to make any difference prejudicial to the Defendant, whether the Plaintiff chuses to present the check for payment himself, or to employ his banker as an agent to present it for him. The accepting a check does not, as it has been argued, confer on the payee the power of employing a banker to receive the money; it only gives him the right himself to carry the paper to the drawee, and receive the sum. The only question therefore is, whether there would have been laches in the presentments that were made, if the Plaintiff had still kept the check in his own hands. The law knows nothing of the practice of clearing-houses, and it would be a strange thing to sanction these new practices of bankers as the law of the land. The bill has never been presented for payment at all; it ought to have been, in the first instance, presented for payment at the banking-house on which it was drawn; or, at all events, it ought to have been carried thither, when it was found that *Bloxam*'s clerk did not attend at the clearing-house; for it has again and again been decided, that the insolvency of the drawee, however notorious, will not dispense with the necessity of presenting a bill to him for payment: this was very recently recognized in the case of *Warrington* v. *Furbor*, 8 *East*, 242. It was more

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particularly incumbent on the holder in this case to present it, because the answer given on the preceding evening, that it was a good bill, and would be paid next morning, with a preference, invited the experiment.

Shepherd in reply. The Defendant, in giving this check, impliedly undertakes to pay it himself in case his bankers do not pay it in one of those two modes in which it is usual for bankers to pay checks, and those are, that if the Plaintiff presents it in person, they shall pay it at sight, at their banking-house; but that, if he lodges it with his own bankers, and they present it for acceptance on the same day, the Defendant's bankers shall accept it, payable the next day at their clearing-house. It has never yet been decided, that a holder is not warranted in taking an acceptance, by which the acceptor agrees to pay at a particular place: and therefore it was allowable to take this, which was in fact an acceptance payable at the clearing-house, unless it shall be held, that no person who receives a check is warranted in lodging it with a banker, but that he must present it for payment with his own, or some other than a banker's hand. And since the Plaintiff has a right to take the whole of the second day to obtain payment, whether he presents it so early on the first day as to get it then paid, or so late as to have it accepted and referred for payment to the clearing-house the next morning, is wholly immaterial. It is true that bankers cannot make a custom pernicious to third persons: but here the practice of the drawer himself authorises the practice of the payee.

MANSFIELD C. J. The whole question amounts merely to this: a man who has bought goods and given a draft on a banker, contends that he has paid for those goods, though the Plaintiff has never received the money. A draft was drawn on the 11th of *September*: on that day it was carried

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carried to the house of the drawee, and, in the language of those persons, was marked: the effect of that marking is similar to the accepting of a bill; for he admits hereby assets, and makes himself liable to pay. It is the practice of bankers not to pay bills of this description which are presented after four o'clock, but to mark them; and it is usual that bills marked on one day, are carried to the clearing-house where their clerks meet, and paid there on the next day. Therefore it is the same thing as if a banker had written on a check,—We pay this to-morrow at the clearing-house. On the next day after marking the check, the banker stops payment: the holder's clerk goes to the clearing-house, where no clerk attends from Messrs. *Bloxams*, and the bill is not paid; and the first question is, whether there is any laches as to the time of presentment: as to that, the case of *Appleton* v. *Sweetapple* decides, that a check need not be presented on the day on which it is drawn; now this bill was in fact presented and accepted on the very day on which it was drawn: the reason of that haste probably was, in order to fix the banker, lest the drawer should be insolvent before the next day, bankers being usually persons of great substance; whereas the drawer may be of less credit. The mark on the check is an engagement to pay at a particular place: is not then the presenting it at that place equivalent to presenting at the banking-house? It seems that it is, and that it therefore is no laches; consequently, the surplus of the money for the coals remains due, and

Judgment must be entered for the Plaintiff.

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DOE, on the Demise of GIGNER, v. ROE.

May 30.

Where a Defendant in ejectment shews by affidavit that he is coparcener, joint-tenant, or tenant in common, and denies actual ouster, the Court will permit him to confess lease and entry only, without confessing ouster.

A Person named *Swaddell* had, in the year 1795, obtained from two coparceners an agreement for a lease for 21 years: in 1796 one of the coparceners executed a lease according to the terms of this agreement; the term and interest of the lessee came by divers mesne assignments to the real Defendant. The coparcener who had executed the lease, devised her moiety to the original lessee, in trust for the other coparcener for life, with remainders over. The surviving coparcener, who was the lessor of the Plaintiff, having refused to execute a similar lease, in pursuance of the agreement, for the residue of the term, the assignee had filed a bill for a specific performance, which the lessor of the Plaintiff encountered by bringing this ejectment.

Runnington Serjt. had on a former day obtained a rule *nisi*, that the tenant in possession might be at liberty to confess lease and entry only, but not ouster, unless an actual ouster of the Plaintiff's lessor should be proved at the trial: the real Defendant's affidavit, on which the rule was obtained, directly disaffirming any actual ouster.

Onslow Serjt. shewed cause: *Runnington contrà.*

The Court held, that it was merely a matter of course to grant the rule wherever the Defendant was a joint tenant, tenant in common, or coparcener; and here it appeared that such a privity of estate subsisted.

Rule absolute.

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June 1.

Ex parte Scrope.

An attorney who has ceased to practise after the passing of 25 G. 3. c. 80. and before the operation of 37 G. 3. c. 90. s. 31. had commenced, may be re-admitted without paying any penalty or arrears of duty.

SHEPHERD Serjt. had in the last term obtained a rule *nisi*, that this gentleman, who had formerly been an attorney of the Court, might be again admitted without payment of any fine to the king, or any arrears of duty on his certificate. He was first admitted in 1767, and practised with credit until a large estate had come by devise to his wife, for her life, with an injunction to assume the name of *Scrope*, which he did, and at his own desire was struck off the roll in 1792. But his wife being dead, and the estates consequently gone over to the remainderman, he was desirous to resume his profession. He had, as the practice of the Court required, announced his intention to be re-admitted, by giving the same notice which is requisite in the case of an attorney upon his first admission. He had also given due notice to the stamp-office, by direction of the Court; on behalf of whom,

Best Serjt. now opposed Mr. *Scrope's* admission, except upon the terms of his paying up his arrears of the duty upon his annual certificate, imposed by 25 *Geo.* 3. *c.* 80., from the time of his quitting the profession, to the present day: he was an attorney in 1785, when that duty was first imposed, and continued such till 1792: he therefore must have had a certificate under these acts from 1785 to 1792: and as the act of 37 *Geo.* 3. *c.* 90. says that he shall, after a discontinuance, receive no benefit from any certificate to be granted under the former act, unless he pays up his arrears in the manner prescribed by the latter act, he must necessarily pay the duty from the year 1792 up to the present time.

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Williams and *Shepherd*, Serjts. in support of the rule: The statute which requires that the attornies on their admission shall pay up the arrears of duty, is the 37th *Geo.* 3. *c.* 90. *s.* 31., which provides, That the Courts may readmit any such person; *i. e.* "admitted, sworn, enrolled, or registered in any of the Courts, who, *after the first day of* November 1797, shall neglect to obtain his certificate," on payment to the commissioners, of the duty accrued since the last certificate obtained by such person, and such further sum of money by way of penalty, as the Court should think fit to order and direct. The act was made five years after this gentleman had ceased to be an attorney, and was wholly prospective; and therefore does not apply to the present case.

The Court held that the case was too clear for argument, and that there was consequently no reason why Mr. *Scrope* should pay the 6*s.* and 8*d.*, which was a mitigation of the penalty directed by the statute; but as this case was not within the statute, no penalty at all was incurred.

Rule absolute for his being readmitted without payment of any arrears of duty, or penalty.

WILKS *v.* LORCK.

June 1.

If a Defendant be arrested by a wrong *Christian* name, the Court will discharge him on motion. And the sheriff is liable to an action.

THE Defendant, who was in custody on mesne process, shewed by his affidavit, that he was baptized by the name of *Berend*, at *Memel*, in the kingdom of *Prussia*, and had always gone by that name; and had never, to his knowledge, been called by the name of *Bernard*, until the sheriff arrested him by that name; on which

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which ground *Onslow* Serjt. obtained a rule *nisi* for discharging him out of custody.

Shepherd Serjt. shewed for cause, that in the bail-bond he was described by the name of *Bierne.* Besides, the Court will not summarily interfere in this case: because, if they do, they will expose the sheriff to an action for false imprisonment: whereas if the Defendant be left to plead the misnomer, he must not only verify his plea by affidavit, but bring a witness from *Memel* to prove by what name he was baptized, and hath since been known.

Onslow, in support of the rule, referred to *Stevenson* v. *Danvers*, 2 *Bos. & Pull.* 109., *Delanoy* v. *Cannon*, 10 *East*, 328., *Dring* v. *Dickenson*, 11 *East*, 225., *Cole* v. *Hindson*, 6 *T. R.* 234., *Shadgett* v. *Clipson*, 8 *East*, 328., and *Dixie* v. *Scholey*, *cit. ibid.*

LAWRENCE J. Those cases go the length of shewing that if the sheriff arrests a man who is named in a writ by another name than his true name, the sheriff will be a trespasser, and is liable to an action of false imprisonment, and perhaps the Plaintiff is so likewise; and they are equally liable whether the Court summarily interfere or not.

Upon the Defendant's undertaking to bring no action, the Court made the rule

Absolute (*a*).

(*a*) See the next case, *Ahitbol* v. *Beniditto*.

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AHITBOL v. BENIDITTO.

But where there is only an inaccuracy in the spelling, so that the name is still *idem sonans*, the Court will not interfere.

BUT in this case, where *Aaron Beniditto* had been sued and arrested by the name of *Aaron Benedetto*, upon the like application, as in the last case, being made by *Pell* Serjt., the Court said it was *idem sonans*, and refused the rule.

June 2.

JEFFS v. SMITH.

If a trader keeps house, and causes himself to be denied to a tax-gatherer who calls for the taxes, it is an act of bankruptcy.

THIS was an action brought against the sheriff of *London* for falsely returning *nulla bona;* and upon the trial of the cause at *Guildhall*, at the sittings after last *Hilary* term, the only question in the case was, Whether the writ of execution which had been sued out was overreached by a prior act of bankruptcy, the existence of which would justify the return? The act of bankruptcy relied on was this: *Lawson*, a tax-gatherer, called at the house of the bankrupt to collect the assessed taxes and property-tax. The bankrupt was at home, and was, with his own assent, denied to *Lawson*. The jury found a verdict for the Plaintiff.

Best Serjt. had on a former day obtained a rule *nisi* to set aside the verdict and enter a nonsuit.

Shepherd Serjt. now shewed cause. There is a distinction between the species of act of bankruptcy committed by the debtor's leaving his house with intent to delay his creditors, and his beginning to keep house: in the latter case it is necessary that a creditor should be actually delayed; but it is not necessary in the former case.

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case. And the creditor who is delayed by the keeping house must be such a creditor, who, upon the denial, can immediately sue out a commission of bankrupt, or immediately arrest the party: but this tax-gatherer could do neither; nor could he prove his demand under the commission. This demand is rather a duty than a debt. The tax-gatherer might indeed have distrained under a warrant; but he could pursue neither of the other two courses: no case has hitherto been decided on this question.

MANSFIELD C. J. Could not the crown proceed immediately against the person of the debtor, as well as against his estate? And if he were dead, would not these taxes be a debt to be first paid by his executor? I cannot say that the crown is not a creditor, and that the keeping out of the way to avoid that creditor is not as much an act of bankruptcy as avoiding any other creditor.

Rule absolute.

Best was to have supported the rule.

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CONSTABLE *v.* NOBLE.

June 2.

A policy at and from a place, the name of which equally designates a particular town, and a port comprehending an extensive district of coast, does not protect a cargo laden any where within the limits of the port, but refers to the town itself.

A policy "at and from *Lyme* to *London*" does not protect a cargo laden at *Bridport* within the port of *Lyme*, and eight miles nearer to *London*.

THIS was an action upon a policy upon flour, at and from *Lyme* to *London*, by the *Swift*, and ship or ships. Upon the trial of this cause at the *Guildhall* sittings after last *Hilary* term before *Mansfield* C. J. it appeared that the first part of the flour insured was put on board the *Swift* at *Lyme*, which sailed from thence and arrived: another parcel was shipped at *Bridport Harbour*, on board the *Rose*, which, in coming round to *London*, was captured by a *French* privateer. It was proved that there is no custom-house at *Bridport Harbour*, which is a member of the port of *Lyme*; that all ships which sail from thence are obliged to proceed to *Lyme* in order to procure their clearances there, from the customer of that port, and that *Bridport Harbour* lies about nine miles to the eastward of *Lyme*, and consequently geographically nearer to *London*, and a vessel bound from *Lyme* to *London*, must therefore pass *Bridport* in her course; but whether on account of the necessity of standing out at first from *Bridport* on a more *southerly* course, in order to get clear of the *Bill* and island of *Portland*, before the *easterly* course could be pursued, it was a more or less easy navigation from *Bridport* to *London* than from *Lyme* to *London*, did not appear by the evidence: *Axmouth*, which lies about ten miles to the westward of *Lyme*, is also a member of the same port. The Defendants contended, that the *Rose* did not sail from *Lyme*, and that therefore this voyage was wholly a different adventure from the voyage insured, and the risk never attached, for that the description in the policy referred to the local point from which the vessel was to sail, not to any political divisions of the kingdom. On the other hand the Plaintiff urged, that a sailing from any

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any part of the port of *Lyme* was sufficient to satisfy this policy, and as *Bridport* was nearer to *London* than *Lyme* was, the circumstances were so much the more favourable to the Defendants, who therefore could not complain. *Mansfield* C. J. reserved the point, subject whereto the jury found a verdict for the Plaintiff.

Lens Serjt. in this term obtained a rule *nisi* to set aside the verdict and enter a nonsuit.

Shepherd, *Best*, and *Vaughan*, Serjts. now shewed cause. If a ship receives her cargo at *Deptford*, that is not locally and strictly at *London*, but she would receive her clearances from the custom-house of *London*, and the risk would be protected by a policy at and from *London*. In this case an insurance at and from *Bridport*, and an insurance at and from *Lyme*, would equally have protected this risk, though perhaps an insurance at and from *Bridport* might not have protected a risk at and from *Lyme*, because the town of *Lyme* is more distant, and therefore the risk would be increased: but it is sufficient in a policy generally to designate the port from which a vessel sails; more minute accuracy is not required: it is not necessary to designate some particular point or district in the port itself. If it were, half the policies effected would be void. It would be said that a ship which loads at the sufferance quays in *Surrey* does not load in *London*. Nor would cargoes taken in at *Limehouse* and *Gravesend*, which are in *Middlesex*, be protected by a policy at and from *London*. The words must be construed according to the subject-matter: it has lately been decided in the Court of King's Bench, that neither the *London Docks*, nor the *East India Docks*, are within the city or liberties of *London*: yet who will say that ships there laden are not protected by a policy at and from *London*?

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London? The case of *Payne* v. *Hutchinson*, C. P. *Guildhall* sittings after *Trinity* term 1808 (*a*), is distinguishable from this, for there the vessel was lost in a river, where she

(*a*) PAYNE *v.* HUTCHINSON.

Nov. 21.

If a policy describe a voyage at and from a place which is the head of a port, it will not cover a voyage at and from a distinct place which is a member of the same port.

THIS action was brought upon a policy of insurance, effected at a premium of four guineas *per cent.*, upon goods on board the ship *Catherine*, "at and from *Caermarthen to London*," to recover a partial loss by damage by sea-water. The declaration averred that the ship was in good safety at *Caermarthen*, and that divers goods of great value were there, to wit, at *Caermarthen*, loaded on board the said ship, to be carried from thence upon the voyage insured, and that the Plaintiffs were then and there interested in the said goods to the whole amount of the insurance. Upon the trial of the cause at the sittings after *Trinity* term 1808, at *Guildhall*, before *Mansfield* C. J., it appeared, that several actions on the same policy having been commenced, a consolidation rule had been obtained, upon the terms of the Defendant's admitting his subscription and the interest as averred in the declaration. The evidence was, that the vessel took in a cargo of tin plates at *Llanelly*, and sailed thence for *London*. *Llanelly* is a member of the port of *Caermarthen*, but there is a distinct custom-house at *Llanelly*, as well as a custom-house at *Caermarthen*, and when ships clear out from *Llanelly* a custom-house officer is sent over thither to give them their clearances; but *Caermarthen* lying high up the river, and accessible only by an intricate navigation, few ships engaged in the coasting trade clear out from that place, except coasters belonging to *Caermarthen* itself: the cocket produced in evidence was furnished by the custom-house at *Llanelly*. It was objected for the Defendant, that the Plaintiff had not proved his interest in the goods, and that this was a fatal variance; for that the voyage and goods described in the policy was a voyage from *Caermarthen*, and goods loaden there; and there was no evidence that such a voyage had ever been commenced; if the policy was meant to apply to the voyage from *Llanelly*, the voyage was not correctly described in the policy, and either there was no proof of the Plaintiff's interest, or the risk never attached. The jury, however, found a verdict for the Plaintiff for 45*l.* 9*s.* 8*d.*

Vaughan Serjt., in *Michaelmas* term 1808, obtained a rule *nisi* to reduce the damages to 4*l.* 4*s.*, the amount of the premium, upon the ground that the risk had never attached.

Shepherd Serjt., for the Plaintiffs, on a subsequent day in the

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she never could have gone at all, if she had sailed from *Carmarthen* instead of *Kidwelly*: here it is in proof that a ship coming out of *Lyme* must pass by *Bridport Harbour*. In the case of *Higgins* v. *Aguilar* (a), on a policy at and from *Demerara* to *London*, it was held, that a loading at *Essequibo* was a loading at *Demerara*.

MANSFIELD C. J. That case was decided upon the particular usage of the trade; and if the Plaintiff in this case could have proved an usage for ships to load at *Bridport*, upon a policy at and from *Lyme*, it might have assisted him; but no such usage was proved here. Probably the underwriters never underwrote a voyage from *Bridport* in these terms before. The whole is obviously a mistake, and proceeded from the circumstance, that the parties knew that the *Swift*, the first vessel which was covered by this policy, was to sail from *Lyme*; they therefore concluded that the ship and ships would sail from the same place. It was in evidence, that *Guernsey* is within the port of *Southampton*, and *Liverpool* within

(a) The Reporter has not been able to find this case in print.

the same term, argued, that the Defendant was estopped by his admission from setting up any such defence. He had admitted the interest as averred in the declaration. The interest averred in the declaration was an interest of the Plaintiffs in the said goods; the said goods were the goods before averred to be loaded at *Caermarthen*; so that in effect, in admitting the interest, he had admitted that the goods insured were loaded at *Caermarthen*; and he was now precluded from proving or contending the contrary.

Vaughan was prepared to support his rule.

The Court observed that, there were separate custom-houses at *Caermarthen* and *Llanelly*, and that a custom-house officer was sent over to the latter place, when coasters clear out from thence: the admission of interest had not precluded the objection, which must therefore prevail.

Rule absolute.

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the port of *Chester*, and that the port of *Exeter* extends near thirty miles to the eastward of that city.

Rule absolute.

Lens and *Marshall*, Serjts. were to have supported the rule.

MORRISON *v.* PARSONS.

June 2.

If the owner of a ship, having chartered her for a voyage, assigns her before the voyage, though he afterwards assign the charter-party to another, if she earns freight, the assignee of the ship is entitled to the freight, as incident to the ship. But he cannot sue on the charter-party otherwise than in the name of the assignor.

THIS was an action of *assumpsit*, brought to recover 535*l.* 2*s.* claimed to be due to the Plaintiff for the freight of a cargo of goods carried from *Stockholm* to *Plymouth*, under an agreement of charter-party made on the 17th of *August* 1808, whereby the Plaintiff, being owner of the ship *Brothers*, contracted with the Defendant that she should sail to *Stockholm*, and there load from the Defendant's factors a cargo of tar for *Plymouth*, and there deliver the same, on freight, at the rate of 13*s.* *per* barrel, one half of the freight to be paid on the delivery of the cargo, and the remainder in three months following. Upon the 26th of *August* the Plaintiff executed a regular assignment of the ship to *Henry*, the master of her, but no reference was therein made to the charter-party, or the freight to arise therefrom; the vessel was duly registered in the name of *Henry*, under whose command she sailed, in pursuance of the charter-party, about the 8th of *September* 1808, upon her voyage to *Stockholm*. The Plaintiff being indebted to *Hamilton* in 860*l.* on the 1st of *February* 1809, by indenture of that date made between himself and *Hamilton*, reciting therein the charter-party, and his debt, and that he had proposed to assign the freight for security, and had requested *Hamilton*, if it should be considered

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considered by him as necessary or expedient to effect an insurance thereon, in consideration of the debt so due, and of 5*s*., the Plaintiff assigned to *Hamilton* all his right, title, interest, claim, and demand in the monies to become due by virtue of the thereinbefore-recited charter-party, to hold, take, and enjoy the same unto *Hamilton*, his executors, administrators, and assigns, upon trust thereout to defray the costs of that assignment, and of the execution or management of the trusts in him thereby reposed, and to pay to himself any premiums or commission, and all other charges of effecting any insurance upon the freight, and after such payments then upon trust to apply the balance in payment of the debt and interest up to the day of payment, and if there should be any surplus, in trust to pay the same over to the Plaintiff. The Plaintiff then proceeded to constitute *Hamilton* his attorney irrevocable, to sue for and receive the freight, and give discharges, and effect insurances. He also covenanted for title to the ship and charter-party, and for further assurance, and that he would not revoke the authorities thereby given, or release. On the 2d of *June*, the *Brothers* being then expected home from *Stockholm*, *Hamilton*, by a notice, wherein he recited the assignment which had been made of the freight, required the Defendant not to pay it to any person except himself. The vessel having arrived at *Stockholm*, took in a complete cargo of tar, and again sailed, and arrived at *Plymouth* in the middle of *July*, and about the latter end of the same month completed her delivery; shortly after which the Defendant, without retaining any part until the expiration of the three months, paid, notwithstanding the assignment and notice, the whole of the freight to *Henry*, to whom the Plaintiff was indebted for monies advanced for the ship's use. This action was brought in the name of the Plaintiff, for the benefit of *Hamilton*. Upon the trial of this cause at *Guildhall*, at the sittings after last *Hilary* term,

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before *Mansfield* C. J. the jury found a verdict for the Defendant.

Best Serjt. on a former day in this term, obtained a rule *nisi* for a new trial, upon the ground that the jury had taken upon themselves to decide in the affirmative the question of law, whether by a transfer of the ship the inchoate right to freight is also transferred, a position which he denied upon the authority of *Splidt* v. *Bowles*, 10 *East*, 279. where, upon a case sent by the Master of the Rolls, on the question whether the assignees of a bankrupt, who had let his ship upon freight under a charter-party, or the person to whom, after making the charter-party, and before his bankruptcy, he had assigned his vessel, were entitled to recover the freight in covenant on the charter-party, the Court held, that the assignees of the bankrupt's estate, and not the purchaser of the vessel, was entitled to recover, and that a Court of law could not take notice of trusts.

Shepherd Serjt. on this day shewed cause. The verdict is right, for payment made to the *cestuy que trust* is payment to the Plaintiff. It is observable that the ship was assigned to *Henry* before she began to earn freight. If, after the assignment, goods had been put on board in *Sweden*, not under a charter-party, but merely under bills of lading, it is clear, that upon the ship's arrival here, *Henry* would have had a right to detain the cargo till the freight was paid him. Or he might have brought *assumpsit* for the freight; for he could prove that he was owner, that he took the goods on board, carried them, and delivered them. The charter-party, which existed in the present case, made no other difference in his right in this respect, than that an action thereon must be brought in the name of the Plaintiff, not in the name of *Henry*; consequently the Defendant's payment to *Henry* would discharge him

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him from the action in which he would otherwise be liable to the Plaintiff on the charter-party, by reason of the privity of contract between them; unless this were so, the owner of the goods would have no means to obtain possession of them, except by payment of double freight, first to the plaintiff suing on his contract, and again to the ship-owner; for whosoever might have happened to be owner of the ship at the time of her arrival, would have had a lien on the goods till he had received at least that half of the freight which by the charter-party was to be paid on delivery. The Plaintiff himself, therefore, has put the Defendant into such a situation that he cannot obtain possession of his goods, till he has paid the freight to the Plaintiff's assignee of the ship. But further, wherever a ship is assigned, the assignee is entitled in equity to all the freight which afterwards accrues. Suppose the obligee of a bond had assigned his bond to another; payment by the obligor to the assignee, is a good payment to the obligee. *Lynch* v. *Clement*, 1 *Lutw.* 577. it was laid down, that a tender to the *cestuy que trust* of a bond, would be a good tender to the obligee. The rights of the assignee of a bond have been taken into consideration in courts of law. *Fenner* v. *Meares*, 2 *Bl. Rep.* 1269. *Assumpsit* by the assignee of a bond against the obligor, who had notice of the assignment and agreed thereto. *Nares* J. asked, "If "the Defendant had paid the Plaintiff, and the obligee "had sued the Defendant, whether he might not have "pleaded payment." And it was admitted by the Defendant's counsel that he might: and the Court held, that the action was maintainable. *Bottomley* v. *Brooke*, cited in *Winch* v. *Keeley*, 1 *Term Rep.* 621. The Defendant pleaded, to debt on bond, that the bond was given for securing 100*l.* lent to the Defendant by *E. Chancellor*, and was given by her direction to the Plaintiff, in trust for her; and that *E. Chancellor*, before the action brought, was indebted to the Defendant in more money

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than the amount of the bond: to this there was a demurrer, which was withdrawn by the advice of the Court. *S. P.* on demurrer, in *Rudge* v. *Birch*, and *Rudge* v. *Tyte*, *Mich.* 25 *G.* 3. *B. R.* cited *ibid.* But wherever a set-off is good, payment is good, and a trustee cannot be permitted to set up a subsequent assignment against the effect of his own act. Therefore, inasmuch as the assignment contains no special exception of this trust, every payment to the assignee of the ship, who is the *cestuy que trust* in this case, is a payment to the trustee. The subsequent assignment to *Hamilton* can make no difference. And it is not unimportant, that *Henry* had at *Stockholm* advanced money on account of the ship to the whole amount of the freight; so that he had a lien on the whole freight for the repayment; but the principal ground is, that payment to *Henry* is payment to the Plaintiff.

Best and *Runnington*, Serjts. contended for the Plaintiff, 1st, that payment to a *cestuy que trust* is not, in law, payment to a trustee: but, 2dly, it must appear that *Henry* is the *cestuy que trust* of the Plaintiff, and that there is no trust for any other person. If *A.* contracts with *B.* to carry goods, or to perform any other work, and performs it through the agency of *C.*, a payment to *C.* for the work is not therefore a payment to *A.* It is not true, that if the Defendant had paid freight to the Plaintiff, he could not have obtained from *Henry* the possession of the goods; for *Henry* had adopted the contract which the Plaintiff had made, and agreed to perform the voyage under that contract. It is not uncommon after chartering a ship, to assign the charter-party as a security for money advanced for the outfit, and it would be an instrument of fraud, if the owner could afterwards, by selling the ship, vacate that security. But if equity is to be considered in this case, the Court will look to all the equities.

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equities. A person, by whose negligence the charter-party remains in the possession of the Plaintiff, cannot complain that it is conveyed into other hands. If, on becoming the owner of the ship, he wishes also to become the owner of the charter-party, he must require it to be actually assigned to him; otherwise, it remains with the original charterer. *Splidt* v. *Bowles*. No interest in the charter-party, either legal or beneficial, passed by the assignment of the ship. That instrument contains no words descriptive of any property except the ship and her tackle. The Plaintiff, therefore, never was a trustee for *Henry*; consequently the doctrine, that payment to a *cestuy que trust* is payment to the trustee, does not apply here to prevent the Plaintiff from recovering. But upon the same doctrine, payment to *Hamilton* would have been a good payment to the Plaintiff, because the Plaintiff was in truth a trustee for *Hamilton*. In *Bottomley* v. *Brooke*, the Court gave no judgment, but only a recommendation to withdraw the demurrer. [*Heath* J. *Bottomley* v. *Brooke* has often been allowed to be cited.] And neither that nor any of the cases go the length of proving that, supposing the Plaintiff to be a trustee for *Henry*, payment to *Henry* would be payment to the Plaintiff. To decide this, would in all cases convert a court of law into a court of equity: whereas the court of law has not the means to look into the situations and circumstances of all parties. It would destroy the whole system of trusts to hold, that a tender to a *cestuy que trust* is equivalent to payment to a trustee, when the very object of many trusts is, to keep the property out of the hands of the *cestuy que trust*. The case of *Rudge* v. *Birch* is no where in print, except in the argument of counsel in the case of *Winch* v. *Keeley*, and is there so briefly stated, that it is of little authority. The case in *Lutwych* only proves, that a tender to the person to whom a bond is assigned, is a good plea. This may well be; for

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for a tender to an attorney is doubtless a good plea, and the assignee of a bond is always constituted the attorney of the obligee. But it does not therefore follow, that payment to a *cestuy que trust*, who was not attorney, would be good. But the great ground is, that, according to the authority of *Splidt* v. *Bowles*, it is impossible that the Plaintiff can be trustee for *Henry*. [*Mansfield* C. J. All which that case decides is, that a person standing in the condition either of *Henry* or of *Hamilton*, could not bring an action upon the charter-party in his own name; that no interest, that is to say, no legal interest, passed by such assignment.] *Chinnery* v. *Blackburn*, 1 *H. Bl.* 117. it was held, that the right to the freight did not pass by the transfer of the ship. It was there argued, that freight was incident to the ownership of the vessel, as rent is to that of land; but it was held, that the owner of the ship could not recover it in his own name. [*Heath* J. Certainly not.] The justice here is on the part of the Plaintiff; the Court will therefore endeavour to support his claim without driving him into equity. The charter-party was made on the 17th of *August* 1808. On the 26th of *August* the Plaintiff assigns the ship to *Henry*, the legal right to the freight still continuing in himself. On the 1st of *February* 1809, the charter-party is assigned to *Hamilton*. On the 2d of *June*, and long before the ship's arrival, *Hamilton* gives notice to the Defendant of this assignment, and directs him to pay the freight to none except himself. The whole equity of the case rests on that notice. *Clark* v. *Adair*, *sittings after Easter term*, 4 *G.* 3. cited by *Buller* J. in 4 *T. R.* 343. *Master* v. *Miller*. *Debray*, an officer, drew a bill on the agent of a regiment, payable out of the first money which should become due to him on account of arrears or non-effective money. *Adair* did not accept the bill, but marked it in his book, and promised to pay when effects came to hand. *Debray*

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died before the bill was paid; and the administratrix brought an action against *Adair* for money had and received. It was allowed by all parties, that this was not a bill within the custom of merchants: but Lord *Mansfield* said, that it is an assignment for a valuable consideration, with notice to the agent, and he is bound to pay it. *Buller J.* also cited the case of *Israel* v. *Douglas*, 1 *H. Bl.* 242. where *A.* being indebted to *B.*, and *B.* indebted to *C.* *B.* gave an order to *A.* to pay *C.* the money due from *A.* to *B.*, whereupon *C.* lent *B.* a further sum, and the order was accepted by *A.* On the refusal of *A.* to comply with this order, it was held, that *C.* might maintain an action for money had and received against him.

MANSFIELD C. J. I am extremely glad this case has been brought before the Court; for I thought that the effect of the assignment of a ship, with respect to the freight, might properly be a subject of discussion, and I had not time at the trial to consider the case cited from *East*. Every thing said from that case and others is true that, in order to succeed at law, it is necessary to sue in the name of the contracting party; and that a person standing in the condition either of *Henry* or of *Hamilton*, could not bring an action upon the charter-party in his own name; that no legal interest therein passes by such an assignment; but that decision has nothing to do with the point which is the sole question here, what is the effect of the payment to one who is entitled to receive the beneficial produce of a contract. The question then is, whether an assignment of a ship does not carry with it the benefit of this contract; especially here, where the Plaintiff makes a contract for freight, and afterwards assigns the ship before she sails; so that the assignee was, to all intents and purposes, in possession of her as owner before she sailed. As to equity, whoever

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ever has the prior equity, has the prior right. *Henry* has the prior equity, considered as the person who had an authority from the legal creditor to receive the debt, and therefore payment to him is good payment to *Morrison*.

HEATH J. I am of the same opinion. *Hamilton* could not be in a better situation than the Plaintiff was at the time of assigning the charter-party; and he could not, after the assignment of the ship, prevent *Henry* from receiving the debt.

LAWRENCE J. was of the same opinion, and distinguished the cases cited, which did not at all militate with the judgment of the Court. It is said, the assignee of a bond receives the debt as attorney; no doubt: but the right to freight subsequently accruing must belong to the assignee of the ship as incident thereto. *Sharp* v. *Gladstone*, 7 *East*, 24. is the only case that seems to bear on the point: according to the idea of Lord *Ellenborough* C. J. in his judgment there, after the abandonment of the ship, the underwriters on a chartered ship would be entitled to freight earned afterwards.

CHAMBRE J. was of the same opinion.

Rule discharged.

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If a policy be effected on goods on a voyage defined from *A.* to *B.*, the risk to commence at and from the loading thereof on board, not saying where, it must be intended a loading at the place from which the voyage commenced. And if the proof be, that the goods were loaded in an earlier part of the ship's course, and before her arrival at the place where the voyage insured commences, the Plaintiff cannot recover. Though the same underwriter had insured the same goods for the anterior voyage, and knew the second policy was effected thereon.

If a licence is obtained, giving a neutral wider scope than the exceptions and conditions in the orders of Council give, and not referring thereto, he may avail himself of the privileges conferred by the licence, and is not confined by the restrictions contained in those orders.

Therefore, where the 5th article of the order of Council of 11th *November*, 1807, legalizes the exportation of colonial produce by neutrals clearing out from this kingdom under such regulations as his majesty shall think fit to prescribe, which shall be proceeding direct to the port specified in their clearance, and the licence authorized the vessel to proceed to *Sweden* or any port in the *Baltic*, though the clearance obtained named only *Gottenburgh*, the Court held that the licence authorized the vessel to proceed to *Pillau*, a port in the *Baltic*.

THIS action was brought to recover a total loss on two policies of insurance effected on the ship *Daniel and Frederick*, "at and from *Gottenburgh* to her first port of discharge in the *Baltic*, not higher than *Riga*," on specific goods, valued "at a premium of 35 guineas *per cent.* to return 10 *per cent.* for convoy, and 5 *per cent.* more for arrival;" beginning the adventure upon the said goods from the loading thereof on board the said ship, (not saying where). Upon the trial of this cause at the sittings after last *Michaelmas* term at *Guildhall*, before *Mansfield* C. J. it appeared that the vessel was an *American*, belonging to *Philadelphia*; on the 1st of *April* 1808, she sailed from *London*, having there received on board a cargo of *coffee*, *raw sugar*, and *indigo*, bound for *Gottenburgh*, and some port in the *Baltic*, situated between *Lubeck* and *Riga*, and arived safe at *Gottenburgh*. Insurances had previously been effected upon the cargo, from *London* to *Gottenburgh* only, at a time when it had not been determined to what port the ship should ultimately proceed; but it being at length fixed that she should sail to some port in the *Baltic*, and there discharge her cargo, the insurance in question was effected. Upon

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the ship's arrival at *Gottenburgh*, the port of *Pillau* was assigned to the master as his port of discharge. His cargo was not taken out and re-laden at *Gottenburgh*, he sailed from thence with convoy, and upon his arrival in *Pillau* Roads, while he was engaged on shore in exhibiting the ship's papers, for the purpose of procuring her admittance into the port, his vessel was captured by a *French* privateer. The Defendant having insured the same goods on the former policy from *London* to *Gottenburgh*, was fully aware, when the policy upon the further risk "from *Gottenburgh* to her first port of discharge in the *Baltic*," was presented to him, that he was insuring the same goods as were described in the former policy. The Defendant admitted his subscription, and the Plaintiff's interest. It being conceived, and admitted at the trial, that a licence was necessary for this voyage, the Plaintiff gave in evidence an order for a licence issued by the privy council, and a licence granted in consequence thereof, "for permitting the *American* ship *Daniel and Frederick*, to proceed from any port in the "United Kingdom, to *Sweden*, or any port in the *Baltic*, "with a cargo of such colonial produce as was allowed "by his majesty's order in council of the 11th of *November*, 1807, and having discharged the said cargo, "then to take on board, either at the said port of discharge, or at *Gottenburgh*, or any other port of the "*Baltic*, a cargo of such goods as were allowed by virtue of the aforesaid order to be imported, and to proceed with the same to any port of *Great Britain*." The licence also contained a provision, "that if it should "be found necessary for the ship to proceed from the "port of delivery to any *other* port of the *Baltic*, for the "purpose of taking on board a return cargo, she should "be permitted to proceed to such port in ballast only." Signed *Hawkesbury*. The ship's clearance from *London* did not mention any port of destination except *Gotten-*

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burgh, which is not a port in the *Baltic*. The declaration averred, that on the 8th of *May*, the ship in the policy mentioned, with the goods in the policy mentioned, on board thereof as aforesaid, was in good safety at *Gottenburgh* aforesaid, to wit, at *London*, and afterwards sailed from *Gottenburgh*. For the Defendant it was objected, 1. That the loading thereof on board, mentioned in the policy, must mean a loading thereof at *Gottenburgh*, that being the only port or place mentioned in the policy, and that then, inasmuch as it appeared in evidence that there were no goods laden at *Gottenburgh*, but that the goods described in the policy were laden in *London*, either the risk never attached, or if the declaration intended to aver a loading at *Gottenburgh*, there was a fatal variance. Secondly, the Defendant relied on the order in council of 11th *November*, 1807, by which it is ordered, that all ports and places in *Europe*, from which, although not at war with his majesty, the *British* flag is excluded, and all ports or places in the colonies belonging to his majesty's enemies, shall from thenceforth be subject to the same restrictions in point of trade and navigation, with the exceptions thereinafter mentioned, as if the same were actually blockaded by his majesty's naval forces in the most strict and vigorous manner. But by the fifth article, nothing herein contained is to extend the liability to capture and condemnation, to any vessel, or the cargo of any vessel, belonging to any country not at war with his majesty, which shall have cleared out from some port or place in this kingdom, or from *Gibraltar*, or *Malta*, under such regulations as his majesty may think fit to prescribe, or from any port belonging to his majesty's allies, and shall be proceeding direct to *the port specified in her clearance*. The Defendant contended, that these orders were explained by the additional instructions to cruizers, issued by the privy council on the 26th of *November*, 1807, in pursuance of an order of council made on the

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the preceding day, and directing that vessels belonging to any state not at war with his majesty, laden with cargoes in any ports of the United Kingdom, and *clearing out according to law*, shall not be interrupted or molested in proceeding to *any port in Europe*, (except ports specially notified to be in a state of strict and vigorous blockade before his majesty's order of the 11th of *November*, then instant, or which shall be thereafter so notified,) to whomsoever the goods laden on board such vessels may appear to belong. And he contended, that inasmuch as the *Daniel and Frederick* had not obtained a clearance from *London*, specifying any other port of destination than *Gottenburgh*, she had not cleared out according to law, and therefore was not within the exception contained in the additional orders of 26th *November*, and that consequently the adventure fell within the general prohibition contained in the first article of the order in council of the 11th of *November*. *Mansfield* C. J. considered this last objection as unanswerable, but reserved both points, subject to which he permitted the case to go to the jury, who found a verdict for the Plaintiff.

Accordingly *Lens* Serjt. in *Hilary* term having obtained a rule *nisi* to set aside the verdict and enter a nonsuit,

Shepherd and *Best* Serjts. on a former day in this term shewed cause. It is allowable to call in aid the other documents issued by the government, in order to explain their own acts; and this meaning results from the whole of them; that if, when a ship sails, she clears out for a port of *Europe*, not then in a state of actual vigorous blockade, she shall not be molested by our cruizers. If no ship could clear out according to law, unless her ultimate destination be expressed in her clearance, then

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no trading voyage is legal, for until the ship finds a market for her cargo, her ultimate destination cannot be known; or if it be in some cases known, the universal practice is not to mention it in the clearance. Besides, the clearance mentioned in the 5th article does not exclusively refer to a clearance from a port of this kingdom, for the exception is extended to ships clearing out from any port belonging to his majesty's allies: it is the clearance from the port of *Gottenburgh* therefore which is to be considered. The licence itself is an order of his majesty in council, of equal authority with any other act of his majesty in council: coming after the order of the 11th *November*, it supersedes it as to this cargo: it refers to the former orders in council, for no other purpose than for the specification of the sort of goods which it authorizes to be imported, and to enumerate the excepted goods; but it adopts no other regulations therein contained. The licence does not require the intended voyage to be stated in the clearance; but, on the contrary, it contemplates a different voyage from that mentioned in the clearance; and when this licence therefore is coupled with the instructions given to his majesty's cruizers, the effect of both united is an express permission for the vessel to proceed to *Pillau*. It is not, as if an act of parliament had declared, that the king's prerogative should be limited to granting licences to vessels under certain exceptions: the king may licence an adventure to a port in actual blockade, if he will: a declaration of war is an order of council; but it does not prevent the king from granting licences to trade with the enemy. [*Mansfield* C. J. This point is very important; for the intent of a licence is, to render legal that traffic which was before illegal: and how does it less operate on that which was rendered illegal by the effect of these particular orders of council, than on that which was illegal by a

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general declaration of war? What is there then in the orders of council to prevent this subsequent licence from legalizing the traffic therein mentioned? Or how do the orders render that traffic more than illegal?] Nothing is therein said about any necessity of obtaining a licence. The object of them was to encourage merchants in a hazardous branch of trade, by declaring the principles on which the government intended to proceed, whereas, the doctrine contended for would throw insurmountable difficulties in the way of this trade, by rendering it necessary either to mention in the clearance the name of every port in *Sweden* and the *Baltic*, or if only one is mentioned, the adventurer must be confined to that one, which is clearly contrary to the intentions of government. The only question therefore is, whether this licence embraces the voyage; and as it is a licence to *Gottenburgh* or any port in the *Baltic*, of which description *Pillau* is, it clearly does: and since the voyage is governed not by the rules prescribed by the former orders in council, but by the laws prescribed by the king in this particular case, the licence produced is a sufficient authority for the voyage insured. As to the other point, this case is distinguishable from that of *Robertson* v. *French*, 4 *East*, 130., which was "on the goods, from "the loading thereof on board the said ship, at all and "any port on the coast of *Brazil*;" and the goods lost were loaded at the *Cape of Good Hope*: [*Lawrence* J. The case there was, that the goods were shipped from the *Cape*, for *Brazil*: a policy had been effected on the outward cargo for a time, which had expired: the policy subscribed by the Defendant had been intended to attach on the (*a*) homeward-bound cargo; but the ship not being able to find a market, after a time, returned with the same goods to the *Cape*, and it was held that the

(*a*) See *post*. p. 424., and 1 *Marshall on Insurances*, 2d ed. 323.

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second policy did not attach thereon.] There the outward voyage had ended; these are policies on the outward voyage which is continuing at the time of the loss. *Hodgson* v. *Richardson*, 1 *Bl. Rep.* 463. The policy was at and from *Genoa* to *Dublin*: the adventure to begin from the lading to equip for this voyage. The cargo had been loaden at *Leghorn*, of perishable commodities, more than five months before: the objection was there never thought of, that because the goods were not put on board at *Genoa*, the risk would not attach, but the underwriter was discharged on the ground of a fraudulent concealment of the time and place of lading, making it appear to the underwriter that he was insuring new fresh goods instead of an old damaged cargo; the Court holding, that it is, or in many cases may be, material whether the loading is at the port mentioned, or at another. In this case the time and circumstances of the loading on board at *London* were fully known to the Defendant: that case therefore is so far favourable to the Plaintiff. The words of this policy are those which are usually inserted, without any alteration, in cases where it is known that the goods are not loaded at the port mentioned in the policy, but long before: the meaning of them is, beginning the adventure on the goods, while they are on board. It is doing no great violence to the words of the policy to construe it "beginning the risk at *Gottenburgh*, "on goods found on board the ship at her arrival here."

Lens and *Marshall*, Serjts., *contrà*. As to the last point, the question is not whether the parties might have made another policy on this adventure which should have been valid, but what is the true construction of the present policy. The risk runs from the loading. Where then, and at what time, were they loaded? Not at *Gottenburgh*, upon the ship's arrival there, but in *Great Britain*, many weeks before: but the policy implies that

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that they were loaded at *Gottenburgh*, which is inconsistent with the fact. But the fact is very material to the risk: for the principal danger apprehended was of the *French* confiscating by force all goods put on board in *Great Britain*: if the goods had really been laden at *Gottenburgh* all would have been right and legal: the ship would then have carried real papers instead of simulated papers. Even if the goods had been barely landed, and re-shipped at *Gottenburgh*, so as to entitle the vessel to these papers, perhaps the Court might have supported the Plaintiff's claim. [*Lawrence* J. Suppose the insurance had been "beginning the adventure on the merchandizes from the loading thereof on board at the port of *London*," the voyage being from *Gottenburgh*, as now, would you not then understand the risk to be on goods loaden at *London*, on the voyage from *Gottenburgh* to the ship's port of discharge in the *Baltic*?] If another sufficient averment had been introduced, and the Court could see the whole on the record, they would restrain the effect of the policy from the time of the ship's departure from *London* to the time of her arriving with the goods at *Gottenburgh*; but there is no inference to be drawn on the present record as to which of these two inconsistent averments shall stand. Therefore the Defendant's case is not at all dependent on the case in *Blackstone*. It is true the Defendant had knowledge of the destination of the goods; but that does not enable the Plaintiff to state one case, and to recover upon the proof of another. He alleges the goods to be put on board at *Gottenburgh*, and proves them to be put on board in *London*. [*Mansfield* C. J. I think with you, the goods might have been landed and re-shipped, and that is not a mere form: for, in a certain degree, the parties can judge from the outside of the packages, whether, up to that time, any damage has been sustained; and without such examination, if an average loss should arise, it

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would be almost impossible to determine whether it was sustained before the ship's arrival at *Gottenburgh*, or afterwards. So far, the case of *Hodgson* v. *Richardson* is still applicable: the terms of the policy in that case are much like these, except that it has the words "to equip for the voyage," which seem to indicate an intention of fraud.] Perhaps as the Court rested so much on the ground of concealment in that case, it may be fair to consider the present question as untouched by it: but the case of *Robertson* v. *French* bottoms itself upon the principle, that as the goods were not put on board at the coast of *Brazil* but at the *Cape of Good Hope*, the adventure made was not the adventure described in the policy. [*Heath* J. Did not that case proceed on the ground that it was not the intention of the parties to insure that voyage?] It was no otherwise against their intention than as their intention was to be collected from the words of the policy: but in fact they designed it as a continuation of the risk on that particular cargo, the same underwriter having before insured the goods for a time, which expired on the 17th of *September*, the same day on which this risk had its inception; contrary to what was thrown out by *Lawrence* J. respecting it, above, (p. 421.) and upon the argument in the case of *Grant* v. *Paxton* (*a*). The Court, in *Robertson* v. *French*, said, you shall not apply your policy, whatever you intended in fact, to an adventure which is not described therein. To pursue this rule will generally attain the purposes of justice, but if it should ever be the parties' intention to insure a voyage which they do not describe, it becomes necessary, according to the Plaintiff's argument, that the risk should attach on the goods, in the state they are in on the day of effecting the policy: that rule must be radically wrong: it cannot be, that because the party signs a policy on the

(*a*) This observation is not contained in the report of that case. *Ante*, vol. I. 463.

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first of *March*, it shall apply to a transaction, to which it would not apply, if signed on the first of *May*. Since, therefore, the policy legally and by necessary interpretation describes a voyage, and a commencement of the adventure, different from that set forth in the declaration, the Plaintiff cannot recover. As to the other point, the answer given goes beside the objection. It is not yet clear that this ship needed any licence for her voyage; and the unnecessarily taking a licence where none was necessary, will not put the party in a better situation, nor entitle him to a greater latitude than if he had taken none. This is a licence couched in the most general terms, for the ship *Daniel and Frederick* to bring home produce under the restrictions therein referred to. It is not a licence dispensing with the orders in council; on the contrary it founds itself thereon, and does not at all impugn them, unless it can be shewn that the party could not have the full benefit of this licence, without its superseding those orders. Nothing hinders that the Plaintiff may both obey those orders, and have the benefit of the licence at once. But allowing that the licence imposes on the Plaintiff further restrictions in the prosecution of this trade, that does not excuse him from also bringing himself within the exceptions made in the orders of council, unless the licence plainly and expressly dispenses with them, which it does not. The Plaintiff therefore has not at all advanced his argument, for the Defendant rests on the ground that this is all consistent with, and consequent on the orders in council. But if the licence be inconsistent with them, it is assuming far too much to say that a single secretary of state, who issues this licence, has authority to supersede the orders in council; and unless proof is exhibited of his having had such an authority committed to him, the Court will rather hold the licence void, as militating against an existing edict. [*Mansfield* C. J. The licence

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licence provides that the ship might proceed, if necessary, from her port of delivery to any other port in the *Baltic*, for the purpose of taking in a return cargo in ballast. In availing himself of that permission, it is impossible for her to comply with that part of the order in council, which directs that the ship shall pass unmolested only if she shall be proceeding direct to her port of clearance. That order could not apply to a ship which had a general licence to go where she pleased, but only to ships which are proceeding to some one known port of destination. It is only necessary for the person applying for a licence to state to the secretary of state what voyage he intends; and when that is explained, the council gives a general licence in terms large enough to comprehend those parts which cannot be determined on.] That provision does not apply to the present case, nor shew that the ship was not, for the purposes of this adventure, within the operation of the orders in council: that is a provision for a subsequent period of the voyage, after she shall leave her port of delivery, the clearance, which it is contended the orders in council require, is a clearance from this country to her port of delivery; if she had had this, she might then perhaps have taken benefit of the provision in the licence for the ulterior voyage. The orders in council, therefore, as well as the licence, are both applicable, and both to be observed; if there had been no orders in council the king might have licensed the ship just in the same manner. [*Mansfield* C. J. If there had been no orders in council, no licence at all would have been necessary for this voyage.] This licence is nothing more than a consequence of the orders in council. The Plaintiff might at least have stated in the clearance that the vessel was bound to *Gottenburgh*, and to her further port of discharge in the *Baltic*; for though he could not ascertain whither she was going, he could state that she was going beyond *Gottenburgh*.

burgh. The matter about which the crown is solicitous, is, whither the goods are going; and the Plaintiff names *Gottenburgh*, not because the goods are really going there, but for the sake of touching there to get simulated papers: it is therefore a very material variance, or rather a concealment of that which the crown requires to be disclosed, if a false clearance like this is taken out, which is to expire before the ship comes on the essential part of her voyage, so that she sails in effect without any clearance at all, for her port of discharge; whereas, the orders of council, which are not at all contravened by the licence, but which, together with the licence, form the condition under which she is to sail, expressly require a clearance, not a fictitious clearance, but a clearing out according to law; and both codes must be made to stand together, unless it appear by positive terms, that the latter was intended to repeal the former.

MANSFIELD C. J. Those words "according to law" are of no effect, for if they had not been inserted they would have been implied. It is possible that the freighters might know before the ship sailed that she was going to *Pillau Roads*, but it is more probable that they meant rather to be guided by circumstances, and to confer with their correspondents when the vessel arrived at *Gottenburgh*. It is clear that the general orders in council, if complied with by a neutral ship, render all licence unnecessary. And this licence has no other reference to the orders in council than to define the species of goods licensed, by describing them to be the same which are authorized by those orders to be exported, it has no reference to any conditions with which a trader is bound to comply. The very purpose of inserting the name of the port of delivery in the clearance is satisfied and done away by the application made to government for this licence; for in so applying, the communication is made to

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government, which they wish: in that licence the port is expressed, so far as it can be expressed; and it seems to have been the intention of the parties to reserve an option as to the ultimate port of discharge. The licence is not at all founded on the orders of council, but on the general power of the crown.

LAWRENCE J., in confirmation of this proposition, read the relevant part of the licence.

Cur. adv. vult.

The Court, on this day, decided, that there was no ground for the last-mentioned objection; the licence being sufficient: but, on the other ground, they felt themselves obliged to make the rule for entering a nonsuit

Absolute.

June 2.

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Liberty given in a policy on a fishing voyage, to chase, capture, and man prizes, does not authorize the ship to lie by nine days off a port, waiting for an enemy's ship to come out, when she should have completed her cargo.

Although she lay in wait during that time within the limits of her fishing ground.

THIS was an action brought by the assignees of *Bent*, a bankrupt, upon a policy effected by *Bent*, upon the 26th of *January* 1805, before he became a bankrupt, upon the ship *Port au Prince*, *Isaac Duck* master, "at and from *London* to the *Southern* whale and seal fishery, during her stay and fishing there, and back to *London*, with leave to touch, stay, and trade at all ports and places whatsoever and wheresoever, backwards and forwards, as well on this as on the other side of *Cape Horn*, and the *Cape of Good Hope*, to take on board and discharge goods and stores, and to seek, join, and exchange convoy, without being deemed any deviation," and the

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insurance was declared to be "on ship, valued at "17,000*l*., with or without letters of marque, and with "liberty to chase, capture, and man any prize or prizes, "and to take and return with, or send into port or ports, "any prize or prizes; also to cruize 31 days, either to-"gether or separate, any where, and in any latitude, on "the outward bound passage, on this side of *Cape Horn* "and the *Cape of Good Hope*." The two first counts of the declaration stated a loss by the perils of the seas; the third, a loss by capture by the inhabitants of the island of *Haffee*. Upon the trial of this cause at *Guildhall*, at the sittings after *Michaelmas* term 1809, before *Chambre* J., the parties admitted the bankruptcy of *Bent*, the commission against him, and assignments of his effects to the Plaintiffs, their property in the vessel, and the Defendant's subscription to the policy; and that the ship was well manned and fitted out, and sailed from *London* on her voyage to the *South Seas* in *February* 1805, bearing letters of marque against the then *French*, *Batavian*, and *Ligurian* republics, and the kingdom of *Spain*, and a licence to sail without convoy; and that the journal, kept by an officer named *Maclaren*, who sailed on board the *Port-au-Prince*, and which journal was referred to by the Plaintiffs in their answer to a bill of discovery filed against them in the Exchequer by certain other underwriters, who had subscribed the same policy, and whom the Plaintiffs had sued in the Court of King's Bench, should be read as evidence upon the trial of this cause. It was also proved that the ship was a large vessel of 466 tons burthen, fitted out as a whaler, with 32 guns, and 96 men, a greater number than was necessary for the purpose of the fishing-voyage, and that she had not been heard of since *Maclaren* left her, as prize-master of the *Santa Anna*, at *Port St. Blas*, on the other side of *Cape Horn*, upon the north-western coast of *California*, in *June* 1806. The Defendants re-

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lied on a deviation; to prove which they read the following extracts of *Maclaren*'s journal: "On our arrival off "the port of *St. Blas*, in the *Port-au-Prince*, we observed "in the bay a man of war brig of 18 guns, a small coasting brig, and a ship, which, we were informed, was "taking in a cargo, and would sail in a few days: the anchoring ground was so well defended by the batteries, "that we did not think it prudent to go in with the ship, "as we had but a very few shot left, and therefore hauled "off to the *Maria Islands*, about 55 miles north-west from "the bay, where we arrived next morning, when it was "determined that we should make use of the boats to "watch the ship's sailing: accordingly, I took a boat and "crew, with three days' provisions, and arrived at a rock "about ten miles from the harbour, from whence I "could plainly observe persons to be taking in a cargo "on board the ship: this rock I made a look-out place of "during the day-time; as soon as it was dark, I rowed "in towards the bay, to prevent any vessels getting in "or out unobserved. One morning, being favoured with "a thick fog, I landed about three miles to the westward "of the town, and walked through a thicket of wood, "until I arrived at one side of the bay, where I had a "perfect view of the vessels at anchor, and likewise of "the battery; which I found to be well guarded during "the night-time, as I counted above twenty soldiers on "the platform at sun-rise. I likewise numbered upwards "of forty men on board the man of war brig: after making all the observations I possibly could on the situation of the town and fortifications, I returned to the "boat, and succeeded in getting off from the land unobserved: in this manner I watched the harbour for nine "days, going on board the *Port-au-Prince* occasionally "for provisions and water, and it was determined we "should wait here until the ship should have taken in all

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" her cargo, and that we should then attempt cutting her " out of the bay with the boats. I observed that every " night the land-breeze regularly set in between the " hours of nine and ten, with a heavy squall of wind and " rain, which I afterwards understood is generally the " case during the months of *June* and *July*: this obser- " vation encouraged me to hope, that by getting the boats " well manned and in readiness at that time of the night, " to attack the vessels in the bay, I should not only be " able to carry the ship, but likewise the man of war " brig. On the 17th of *June*, from the rock where I had " secreted myself, I observed the crew bending their sails " on board of their ship: this circumstance convinced me " that the cargo was all on board. I immediately pro- " ceeded for the *Port-au-Prince*, with intent to put our " design in execution as soon as possible; the wind not " being favourable, and blowing so fresh that we could " not carry a whole sail on the boat, we did not arrive at " our own ship till nine on the morning of the 18th, when " we made sail for the port; but for fear of being dis- " covered from the land, we were obliged to keep at a " distance, and likewise under low sail, till dark, when " the wind suddenly changed, with rainy weather, which " prevented us from getting sufficiently near the port that " night. At midnight, the weather clearing up a little, " we manned three boats with 30 picked men, well armed; " my intention then was, to proceed for the rock at which " I formerly looked out, there to secrete the boats during " the day, and as soon as dark, next night, to pull in for " the bay, so as to be in readiness on the approach of the " land-breeze to cut out the vessels. The *Port-au-Prince* " in the mean time was to remain at a distance from the " land, to prevent discovery. After arriving at the place " of destination, the morning proved so hazy, that I could " not see into the bay till ten o'clock; when the fog

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"cleared up, I discovered that the ship had dropped out "of the harbour, and lay at anchor about three miles "from the *Point Battery*; the weather being calm, suggested the necessity of carrying her immediately: accordingly, I sent one of the boats back to the *Port-au-Prince*, with directions for the master, Captain *Duck*, "to make sail for the port at a certain time with the other "two boats. I rowed in towards the port in a different "direction from the ship. This stratagem had the desired effect, and the people on board were led to suppose that we were going into the port; they were also "lulled into security from their situation, having a man "of war and two gun-boats almost within gun-shot, and "the sea-breeze setting in, which would enable them to "get under the protection of their batteries in a few minutes by making sail, which they omitted to do until I "had succeeded in getting between them and the port, "when their confusion was so great, after making sail, "that while one man was endeavouring to cut the cable "with an axe, others were for slipping and paying out "cable, which prevented him who held the axe from "striking twice in the same place. Our other boats not "being able to come up at the same time, I made a feint "to board on the starboard bow, where all hands were "collected to oppose us, armed only with staves and "hand-spikes, with a few pistols, which, however, they "did not think proper to fire: we passed the fore for the "main chains with such rapidity, that we were in possession of the quarter deck before the crew could come aft "to defend it: the captain retreated into the cabin, and "the ship's company, being left without a master, requested to have their lives spared, and they would give "up the ship without further opposition. After securing "the prisoners, being in number thirty-two, on the poop, "we stood across the bay; when a boat came from the "shore

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"shore with orders from the captain of the man of war, "to inquire what our business was on board the ship: "I sent them back with a very insulting answer, daring "him to come out and try his luck at recovering the "prize. My intention was to entice them out, and de-"coy them from the port, in order to enable the *Port-"au-Prince* to cut off their retreat, in which I should "have succeeded, if the *Port-au-Prince* had not appeared "so soon. On examining the papers of the prize, I found "her cargo to consist of pitch, tar, and cedar-plank, with "a small quantity of dye-wood, articles of little value; "but the bad weather was setting in, which would com-"pel us to leave the coast, and no prospect left for the "*Port-au-Prince*, but to proceed for the island of *Coros* "to fill up with elephant oil; I, therefore, agreed to "conduct the prize to *Port Jackson*, being the nearest "*English* settlement: indeed, there was a necessity for "my going in the prize, as there was no other person in "the ship capable of conducting her, and the only navi-"gator left in the *Port-au-Prince* on my departure was "Captain *Duck*, the master; therefore, if we captured "any more vessels, we must either destroy, or give them "up to the enemy, for want of prize-masters. On the "22d of *June*, we sent all the prisoners on shore in the "long-boat belonging to the prize, and received a quan-"tity of tallow from the *Port-au-Prince* to be conveyed "to *New South Wales* for sale, and, on the 23d, departed "from her, and proceeded on our passage to *New South* "*Wales*." The Defendants at first insisted, that the *Port-au-Prince*, while she remained off *Port St. Blas*, was not within the limits of her fishing-ground; but it being proved by the Plaintiff, and distinctly found by the jury, that the place where she lay was within the fishing-ground, though not an eligible station for fishing, the objection was narrowed to the question, whether the transaction

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action of the capture of the *Santa Anna*, taking place on the other side of *Cape Horn*, and therefore not within the liberty to cruize for 31 days given by the policy, were a deviation or not. *Chambre* J. reserved the point, subject to which, the jury found a verdict for the Plaintiff.

Shepherd Serjt. in *Hilary* term obtained a rule *nisi* to set aside the verdict and enter a nonsuit.

Lens Serjt. in this term shewed cause. It was proved that 96 men were a larger crew than was necessary for the mere purposes of whale-fishing; because as the assured had liberty to man prizes, it was necessary that they should be provided with a warlike complement. The liberty to chase, capture, and man, was not restricted as to place, but extended as well to the other as to this side of *Cape Horn*; it was only the 31 days' cruizing, which was restricted in point of place to this side of *Cape Horn*. The capture of the *Santa Anna* was authorized by the liberty to chase, capture, and man; for the result of the evidence was, that the *Port-au-Prince* having occasion in her fishing voyage to go so near to *Port St. Blas*, as to see a *Spanish* ship likely to come out and become a fair object of chasing, capturing, and manning, she wished to decoy the ship out; and the conduct of the *Port-au-Prince* in standing off the port, still continuing upon her fishing station, and sending in the boats in a different direction, was no abandonment of the commercial purposes of the voyage. It was intended that the adventure insured should have a two-fold purpose, and the ship was at liberty to apply herself to operations of war, in such manner and degree as she might deem expedient, provided she did not thereby abandon the other object; but in all cases, while she was prosecuting the one object, she must to a certain degree

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have laid aside the other. If a ship under sail had crossed her course on her fishing ground, and she had chased it for nine days, which she clearly was at liberty to do, she could not, during those nine days, have taken any fish. Or even admitting that the parties had in contemplation a distinction between the employment of the ship as a regular cruizer for 31 days on this side of the *Cape*, and the bare liberty to chase, capture, and man, which was extended to her whole voyage, and that the latter purpose was to be made totally subservient to her commercial objects, which she was not at liberty to quit in quest of the other; yet, if any belligerent object should present itself on the whaling ground, it was quite indifferent how long time might have elapsed since her arrival there: she might equally chase and capture them. The Plaintiffs do not, therefore, seek to emancipate themselves from the trading part of the voyage, as its main and principal object: and the facts stated in this journal are consistent therewith, and shew no deviation, for the ship takes this prize on her whaling ground; she does not even use the whole liberty given her to chase, capture, and man; for she does not go in pursuit of the prize, but seeing a vessel likely within a few days to fall in her way, she merely forbears to take herself out of the way, and captures the prize when it is presented to her, employed as she was on her fishing station, and mans her with men brought out for that express purpose. In *Campb.* 263. *Jarratt* v. *Ward*, S. C. *Park*. 6th *ed.* 398., it was admitted, that the capturing vessel had a right to see her prize safe into port: but neither this, nor any adjudged cases, are precisely applicable.

Shepherd and *Best*, Serjts., *contrà*, contended, 1st, that the liberty to chase, capture, and man, was, like the liberty to cruize for 31 days, restricted to this side of the *Cape*

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Cape of Good Hope and *Cape Horn*. Secondly, that if it extended to the whole voyage, this exploit was not within the scope of the permission. The voyage is a fishing and trading voyage, as well on this side of the *Capes* as on the other. The liberty to chase, capture, and man, without more, would not also comprehend a liberty to cruize: that is expressly added, "also liberty to cruize for 31 days on this side of *Cape Horn*." The restriction of place and time extends to all four of these indulgences: the meaning is, for thirty-one days, together or separate, on this side of the *Capes*, the ship insured may be a perfect fighting ship, but she is restricted in that purpose to 31 days, otherwise she might continue to be a ship of war for an indefinite time: and the underwriter could not know when his risk would terminate, for the insurance on the voyage in its commercial purpose, is not expressed to be at all restricted in point of time, it is from *London* to the *Southern* whale fishery, and back: but all the warlike purpose is restricted to 31 days, and to this side of those two points. If this be the true construction of the policy, it is clearly a deviation. 2. But supposing that the liberty to chase, capture, and man, extends beyond the *Capes*, if the liberty would authorize this transaction, it would authorize every warlike adventure that can be imagined. If a merchantman, simply carrying letters of marque, meets a ship in the course of her voyage, she may take it; if she also has liberty to chase, capture, and man, she may do that likewise; but she must not, under that permission, cruize for prizes. If the *Port-au-Prince* might lie off the harbour nine days waiting for this prize, she might equally have lain off for nine months. When a ship is chasing and capturing, she has, except in the very moment of manning her prize, the benefit of all her crew: she has indeed the express liberty of detaching a part for that specific purpose. But in this case the master sends off his mate and thirty picked

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men; and to leave the *Port-au-Prince* so long a time short of her complement by 30 picked men, must necessarily expose her to increased risk. They are detached to a great distance, in order to cut out this ship; and if the master was justified in this, he might equally have stood justified in attacking the fort, which indeed the officer commanding the detachment would have done, if he had not by observation found it too strong. [*Lawrence* J. There is little weight in that argument, unless the jury had found that there were not enough men left on board to navigate the ship; and the remaining crew of 66 men were in fact far more than enough for that purpose.] But the master afterwards mans his boats for the assistance of the first detachment, which he has no right to do. [*Heath* J. Suppose a ship to be becalmed, or to be in shoal water, may she not use her boats?] It appears from the journal, that when *Maclaren* quitted the *Port-au-Prince*, the only navigator left on board was *Duck*, the master: but whatever number of men a vessel may have on board, she is not competently manned for such a voyage as this, unless the master takes out with him a mate, competent to direct the navigation of the vessel in case of the loss of the master; and if he takes out such a mate, but exposes him for nine days together to a much greater risk than on board the ship, or detaches him as prize-master, it is the same thing as if he had never taken him on board, and the ship is not in the state in which a merchantman ought to be. [*Mansfield* C. J. and *Lawrence* J. That fact is not found by the jury; and if you had meant to rely on it, you should have put it to the jury distinctly: we cannot possibly take it into our consideration.] The lying-by, in the manner this ship did, is not chasing. *Lawrence* v. *Sydebotham*, *Park*. 6 *Ed*. 397. 6 *East*, 45. The liberty to chase, capture, and man prizes, does not authorize a ship to shorten sail and lie by, in order that her prize may keep company with her and be under her convoy,

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till she reaches a port where the prize may be condemned. And what *Lawrence* J. says there is very material, "that every ship sailing upon such an adventure should carry a sufficient supernumerary crew, to be able to man its prizes, and to retain a proper number of men for itself." And though that case is not exactly similar to this, yet it is an authority to shew that these liberties are not to be construed to be more extensive than the underwriters express them. The liberty to chase, therefore, does not include the liberty to lie by and wait for: it is not the same thing as if the ship coming a-breast of a port had stood in and taken a prize, which would much less delay the commercial adventure than to stand off until the prize shall come out. [*Mansfield* C. J. and *Heath* J. The delay is only until the prize should have completed her loading, and until that was done she was not worth taking.] The principle is the same: a thing is done by which the risk to the underwriter is increased; for that reason it is that cruizing is not within the liberty to chase. And this conduct is even more dangerous than cruizing; for a vessel cruizes with all her hands on board. If the liberty had been given to cruize, even that would have its limits. Is it to be contended that under a liberty to cruize, a ship might attack a hostile port, or send boats to cut vessels out of an enemy's harbour, such as *Brest*? The sending a force into port is attended with much greater danger than cruizing upon the high seas. There was a fort, and it was manned with a considerable force of troops; and though the assailants had not the rashness to attack it, that increased the danger. If such an incursion does not come within the description even of cruizing, much less does it come within that of chasing; and if adjudged cases have not yet assigned any determinate meaning to the respective terms of cruizing, and chasing, the terms must be understood by courts of law as they are understood by nautical men, who do not say that a

squadron chases vessels when they are lying by to wait for them. An underwriter may foresee the probable duration of a chase at sea, which may last one, or five, or six days, but he cannot assign any probable limitation to the duration of a cruize, or such a lying in wait as this, nor to the hazards of it. Either, therefore, the liberty to chase, capture, and man, was confined to this side of the *Capes*, or the liberty to chase did not warrant her in standing into port, or sending in her boats. [*Mansfield* C. J. Do you contend that if a vessel had stood still and been taken by the *Port-au-Prince*, or had chased her and been taken in the engagement, it would not have been within the liberty to chase, capture, and man?]

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Cur. adv. vult.

The Court afterwards made the rule absolute for entering a nonsuit.

MATHEW and COUSINS, Assignees of MOORE *v.* SHERWELL.

June 4.

The assignees of a bankrupt cannot recover the amount of a check paid by the bankrupt's bankers after the bankruptcy, in trover for the check against the creditor, to whom the check was delivered and the money paid.

THIS was an action of trover, brought by the assignees of *Moore*, a bankrupt, for a check for the sum of 300*l.*, drawn by the bankrupt on his bankers, Messrs. *Lees* and *Satterthwaite*, and by him delivered, after his bankruptcy, to the Defendant, who was a creditor, and in whose favour it was drawn, in part payment of his account. The Defendant kept the check in his hands a month, and then paid it to his own bankers, who received the amount from Messrs. *Lees* and *Satterthwaite*. One count of the declaration was on the bankrupt's possession of the draft before the bankruptcy; the other was on the assignees' possession after the bankruptcy. Upon

the

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the trial of this cause at *Guildhall*, at the sittings after last *Hilary* term, before *Mansfield* C. J., it was objected for the Defendant, that this action could not be maintained; but that the Plaintiffs ought to have sued for money had and received: the jury, however, found a verdict for the Plaintiff for 300*l.*

Shepherd Serjt., in this term, obtained a rule *nisi* to set aside the verdict and enter a nonsuit.

Best Serjt. now contended that in this case it was competent to the Plaintiffs to sue either in trover, or for money had and received. The property in the check is in the assignees, and they are entitled to sue for the recovery of it. It has frequently been decided, that where one man has obtained the possession of the property of another, it is no answer to an action of trover that the Defendant has parted with the property to a third person. This piece of paper is worth 300*l.*, for it has drawn 300*l.* out of the banker's hands, or if it be not of that value, at least the paper belongs to the Plaintiff; which is sufficient to entitle the Plaintiffs to a verdict, with some damages.

MANSFIELD C. J. The Plaintiffs proceed on the ground that the check is worth nothing, being drawn without authority: how then can they recover on it the sum of three hundred pounds? If the jury had given one halfpenny damages for the value of the paper, I should undoubtedly have certified to prevent costs; and how could the Plaintiffs have set aside that verdict?

LAWRENCE J. Perhaps for excess of damages. Suppose a bankrupt gives a void authority to another man, how can his assignees be entitled to it? Is it theirs?

CHAMBRE

CHAMBRE J. How can you sue for a piece of paper of no value?

Rule absolute.

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ROE, on the Demise of LANGDON and Another, v. ROWLSTON.

June 4.

If an estate descend to parceners, one of whom is under a disability, which continues more than 20 years, and the other does not enter within 20 years, the disability of the one does not preserve the title of the other after the 20 years elapsed.

THIS was an ejectment brought to recover possession of certain premises at *Barnstaple* in the county of *Devon*. The declaration contained two counts, the first of which stated a demise by *Elizabeth Langdon*, widow, and *William Barrett*. The second count was on the demise of *Elizabeth Langdon* only. Upon the trial of this cause at the *Exeter* spring assizes 1809, before *Thompson* B., both the lessors of the Plaintiff established their title as heirs of *William Peart*. In 1739 a person named *Ley*, who was then seised of the premises, devised them to *Elizabeth Ley*, and the heirs of her body, and in case she should die without issue of her body, then over to *John Peart*, his heirs and assigns for ever. The testator died in 1739. *Elizabeth Ley*, the tenant in tail, died without issue in 1756. *John Peart* died before her, in 1740, leaving *William Peart* his son and heir, who died in 1763, leaving two sisters his co-heiresses, one of whom, *Elizabeth Langdon*, was a feme covert at the time of his death, and so continued until 1808, when her husband died; the other sister, *Mary Peart*, who afterwards married a person named *Barrett*, and was the mother of the other lessor of the Plaintiff, was of full age, and unmarried at the time of her brother's decease. The Plaintiff therefore was entitled to recover on the second count for the moiety belonging to *Elizabeth Langdon*, but the statute

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of limitations attached to prevent a recovery on the first count, unless the disability of the one parcener prevented her coparcener from being barred likewise. The jury therefore found a verdict for the Plaintiff on the second count, and the learned Judge reserved to him liberty to move to enter a verdict upon the first count for the whole premises upon the joint demise of *William Barrett* and *Elizabeth Langdon*, if the Court should be of opinion that the disability of one co-heir protected the other against the operation of the statute.

Accordingly *Lens* Serjt., in *Easter* term 1809, moved to enter a verdict upon the first count. He admitted that he had found no case expressly in his favor: but on the reason, that both parceners make but one heir, he contended that when one parcener enters, she must enter as well for her coparcener as for herself. Parceners may join in ejectment; so held by *Holt* C. J. 1 *Ld. Ray.* 726. *Bonar* v. *Juner;* and it is there said, that the case of *Milliner* v. *Robinson* in *Moor*, 682. *pl.* 939. to the contrary, is not law. He admitted that in the case of tenants in common, the title of one might be lost, although the title of the other was protected, but they cannot join in ejectment. It is true indeed that either parcener or joint-tenant may convey, and joint-tenant may demise, but the tenancy is thereby severed, and the purchaser or lessee in either case becomes a tenant in common. [*Mansfield* C. J. Parceners need not join in ejectment; one may bring suit without the other joining. One parcener may make a demise of her share; or may convey her share by settlement. May not a parcener demise without severing. Suppose a parcener marries, is not her husband tenant by the courtesy?] This being one title, the parcener entering for herself must enter for her coparcener also.

Rule *nisi*.

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Williams Serjt. in *Trinity* term shewed cause. At the decease of *William Peart*, *Mary* was under no disability; and the question is, whether the exception given in the second section of 21 *Jac.* 1. c. 16. shall extend to the whole estate, or only to the moiety of that parcener who lay under the disability. There are no cases which bear on the point except collaterally; it is necessary therefore to refer to principles of law. The words of the first section are, that no person shall make entry into any lands, tenements, or hereditaments, but within 20 years next after his or their right or title which shall first descend or accrue to the same, and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made. The present is not the case, where the possession of one coparcener is the possession of the other; it was not clear even at common law, that an action of account did not lie for a parcener out of possession against his companion, and the statute of 4 *Ann.* c. 16. *s.* 27. gave it expressly. But this is a very different case: neither parcener was in possession here. The two moietists need not have joined in ejectment. *Mary Peart* might in 1763 have brought an ejectment for her moiety. The other parcener and her husband might have brought ejectment for the other moiety. Their titles clearly accrued to them respectively in 1763 upon their brother's decease. The feme covert could not then indeed enter without her husband's consent, because she is supposed to be under the control of her husband. But in Lord *Zouch*'s case, *Plowd.* 353. it is held, that if a person dies having levied a fine, and leaves the next in title an adult, who dies the next day, leaving an infant heir, that infant must enter immediately. The only case which seems to bear on the point, is somewhat adverse, but is not the decision of the Court, *Plowd.* 367.: it is thus put by *Bendlose.* "Two joint-tenants

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are disseised, one of whom is within age. The disseisor levies a fine with proclamations: four years pass after the proclamations, and then the joint-tenant of full age dies before the five years passed, the other being within age: the infant who survives shall have five years after his full age as well for the moiety which was in his joint companion who was of full age, as for the other moiety; for the right of this moiety, which was in his companion of full age, first accrues to him after the proclamations made, by force of the cause or matter, to wit, by the jointure, made before the fine. And so it is within the words and intent of that branch, notwithstanding that the moiety was in his companion before, for it is in him now in another form." Whether this be law or not I do not know, but if it be law, yet it is a very different case from the present, for it is by the second saving of the statute of fines; and there the title must first accrue by survivorship after the fine, operating upon a joint-tenancy commenced before the fine; for upon the decease of the companion a new title accrues to the survivor after the fine by matter before the fine, which is exceedingly different from the statute of *Jac.* 1. which requires that the claimant shall enter within 20 years after his title accrues. Besides, a joint-tenant alone cannot bring ejectment. [*Mansfield* C. J. No doubt so long as the disability of one parcener continued, the statute would not run against her. But after 20 years had run from the death of the ancestor, *Mary* could no longer have entered; and it would be singular, if *Mary*, who had long lost her right of entry during the coverture of her sister, should have a right of entry restored to her by the cesser of the coverture.]

Lens Serjt., in support of his rule, contended, First, that coparceners as well as joint-tenants, must join in eject-

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ejectment, [which the Court denied.] If joint-tenant alone were to demise, that lease would be a severance, and it is clear that tenant in common may and must sever; that therefore proves nothing with respect to coparceners, but leaves this point untouched, for in such a case each parcener would recover in ejectment his own moiety as tenant in common; but in the present case nothing has been done to sever the jointure. A lease, though it would sever a joint-tenancy, would not sever a coparcenary; and the question is, whether both parceners having one entire estate, and the right of one being preserved, the right of the other shall not be preserved also. In the old real actions, it is a good plea in abatement to the ability of the Defendant that another ought to be joined as coparcener. *Co. Litt.* 164. *a. Litt. s.* 241. On account of the nonage of one parcener the parol shall demur for both. They are both but one heir, and one of them is not the moiety of an heir, but both of them is but *unus hæres*. 163. *b.* And as they be but one heir and yet several persons; so have they one entire freehold in the land, so long as it remains undivided, in respect of any stranger's *præcipe*. And this coparcenary is not severed or divided by law by the death of any of them; for if one die, her part shall descend to her issue, and one *præcipe* shall lie against them. 164. *a.* If, therefore, all make but one heir, and the title is protected, it is the title of the two. A person whose title is not entire in herself, may avail herself of the title being partly in another: and when the other enters, the first shall recover her share also. The protection of the interest of the one necessarily protects the interest of the other. The case cited from *Plowden* is not in point; but it is applicable in principle; for it shews that where the title is protected, the whole title is protected; and therefore the coverture here has protected the title in

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parcenary, that is, for the feme covert herself, and for her coparcener as well as for herself. 2 *Salk.* 185. *Ford* v. *Gray.* It is said that the possession of one joint-tenant is the possession of the other to protect against the statute of limitations. [*Mansfield* C. J. If your argument is right, why should not the *Barrets* have entered after 20 years, and while the disability of the other parcener continued?] They might have so done: but in that case they would enter before the latest period allowed them for entering. [*Mansfield* C. J. That would be directly contrary to the statute.] A parcener may sever and enter on her moiety, or may enter jointly with her coparcener; and although, after 20 years, she would be barred from severing and entering upon her own separate title; yet she would be entitled to enter in respect of the joint title of all the coparceners when the disability ceased.

Cur. adv. vult.

In the present term *Mansfield* C. J. delivered the opinion of the Court:

In this case were two demises; and a verdict passed for the Plaintiff on the second demise by *Elizabeth Langdon*, the fact being, that the estate descended to *Elizabeth Langdon*, a feme covert, and *Mary Peart*, in parcenary, and that twenty years elapsed without *Mary Peart*'s entering. And the only question was, whether the lessor of the Plaintiff was not entitled to judgment on the first count, on the idea that as *Elizabeth Langdon* was under disability at the time of the descent cast, that circumstance was to operate in favour of the other coparcener. Upon the hearing of the argument, we were, and are now, of opinion, that the entry of *Elizabeth Langdon* cannot give a right of entry to *Barrett*, whose

whose right was before barred by the statute of limitations; but that the judgment must be for the lessor of the Plaintiff for the moiety only.

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